In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-6757

DAVID X. FONTAINE, PETITIONER,

v.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Relevant Docket Entries
United States District Court

Date Filed	Filings—Proceedings
1971	
Aug. 6	Motion to vacate sentence with affidavit to proceed in forma pauperis etc., filed.
Aug. 6	Order granting petition to proceed in forma pauperis, filed and entered.
Aug. 6	Proof of mailing filed.
Oct. 6	Govt's motion to dismiss petitioner's motion to vacate sentence with proof of service, filed.
Oct. 15	Petitioner's traverse, filed.
Dec. 7	Opinion and order denying motion to vacate sentence, filed and entered.
Dec. 7	Proof of mailing filed.
Dec. 21	Petitioner's notice of appeal, filed.
Dec. 21	Letter to attorneys re: appeal, filed.
Dec. 21	Proof of mailing filed.
Dec. 27	Order of CCA granting application for leave to proceed in forma pauperis and denying petition for writ of mandamus, filed.
1972	
Jan. 3	Petitioner's pleading re: error and for designation on appeal, filed.

Relevant Docket Entries
United States Court of Appeals
for the Sixth Circuit

Date Filed	Filings—Proceedings
1972	
Jan. 24	*Certified record* (1 vol. pleadings), filed; and cause docketed.
Jan. 31	Appearance of counsel for Appellant.
Feb. 29	Four copies of Brief for Appellant, with proof of service.
Feb. 29	Four copies of Appendix.
Mar. 30	Twenty-five copies of Brief and Appendix for Appellee.
Mar. 30	Proof of service of brief and appendix for Appellee.
Apr. 5	Case submitted on briefs without oral argument (Weick, Edwards and Kent, JJ.).
Apr. 13	Four copies of Reply Brief for Appellant (Copies distributed to the Court).
Apr. 21	Judgment of the District Court affirmed on order without opinion (Weick, Edwards and Kent, JJ.).
May 4	Motion of Appellant to stay the mandate and send record to Supreme Court for certiorari petition.
May 31	Order staying mandate thirty days (Weick, J.).
June 12	Letter from Office of the Solicitor General requesting that the entire certified record be mailed to the Supreme Court (Supreme Court No. 71-6757).

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, VS. DAVID FONTAINE DEFENDANT.	Cr. No. Arraignment

Proceedings had in the above-entitled matter before Honorable Fred W. Kaess, District Judge, at Detroit, Michigan, on Thursday, November 13, 1969.

APPEARANCES:

JOSEPH ZANGLIN, Esq.
(Assistant United States Attorney)

Appearing on behalf of the United States of America

THE CLERK OF THE COURT: The United States of America vs David Fontaine.

MR. ZANGLIN: Your Honor, this is an arraignment on an information charging the defendant with armed bank robbery. He's been given a copy of the Information. He acknowledges that he understands it and knows what the maximum penalty is.

I have explained to him his right to an indictment by a Grand Jury. He has waived that right and signed a waiver of Rights Form.

He understands that he has a right to an attorney at this time and he informs me that he wants to waive that right and has signed a waiver of that right. Knowing all of these rights he informs me that he intends to plead guilty to the information.

THE COURT: You are Mr. David Fontaine?

DEFENDANT FONTAINE: Yes, sir.

THE COURT: You have received a copy of the information here, the charge here against you for armed bank robbery, is that right?

DEFENDANT FONTAINE: Right.

THE COURT: The first thing of consequence is that you have signed also a waiver of Grand Jury indictment which means you are entitled to have this matter first submitted to a Grand Jury and a determination made by that body and an indictment returned first; do your understand that and the rights you have thereunder? Anyway, that's what you will get if you wanted it to go to the Grand Jury.

DEFENDANT FONTAINE: Yes.

THE COURT: You have signed a waiver of that right, am I right?

DEFENDANT FONTAINE: Yes, sir.

THE COURT: In addition, you are entitled to be represented by an attorney and, if you are without funds with which to employ an attorney, the Court will appoint one for you. The Court has here before it a waiver of assignment of an attorney. Is it your wish to proceed here without an attorney?

DEFENDANT FONTAINE: I guess so.

THE COURT: You have got to know so.

DEFENDANT FONTAINE: Yes, sir.

THE COURT: Are you aware of the maximum penalty in this case? Not that you will get it because I don't know nor does anyone else what the penalty will be, but the maximum penalty under your plea if you do plead, is 25 years and/or $10,000.00 fine; do you understand that?

DEFENDANT FONTAINE: Yes, sir.

THE COURT: You understand the maximum penalty?

DEFENDANT FONTAINE: Yes, sir.

THE COURT: Knowing all these things, is it your wish then that—are you prepared to plead now?

DEFENDANT FONTAINE: Yes, sir.

THE COURT: How do you plead, sir.

DEFENDANT FONTAINE: Guilty.

THE COURT: With respect to your plea of guilty did anyone made any promise to you of any kind with respect to this matter in order for you to offer your plea of guilty here?

DEFENDANT FONTAINE: No, sir.

THE COURT: No one has threatened you?

DEFENDANT FONTAINE: No, sir.

THE COURT: Do you understand the nature of the charge? Do you know what you are charged with?

DEFENDANT FONTAINE: Yes I know what I am charged with.

THE COURT: What are you charged with?

DEFENDANT FONTAINE: Bank robbery.

THE COURT: Armed

DEFENDANT FONTAINE: Armed bank robbery.

THE COURT: On October 8th?

DEFENDANT FONTAINE: Right. I don't know too much about the law because I have never been in Court before.

THE COURT: I just want to know that you know what you are doing.

DEFENDANT FONTAINE: Yes, sir.

THE COURT: Is it your wish that the Court accept your plea of guilty here to this offense of armed bank robbery?

DEFENDANT FONTAINE: Yes, sir.

THE COURT: Did you actually do that?

DEFENDANT FONTAINE: Yes, sir.

THE COURT: Did you actually attempt to rob a bank, or did, I guess you did, of some $1,400.00?

DEFENDANT FONTAINE: Yes, sir.

THE COURT: Are you knowingly and freely and voluntarily offering your plea of guilty here?

DEFENDANT FONTAINE: Yes, sir.

THE COURT: I want to be sure that you know what you are doing. You are pleading guilty to armed bank robbery occuring on October 8th of the Liberty State Bank in Hamtramck.

DEFENDANT FONTAINE: Yes, sir.

THE COURT: And by the use of a gun, pistol, right?

DEFENDANT FONTAINE: Right.

MR. ZANGLIN: Your Honor, I would suggest that the Court ask the defendant to put on the record some of his own statements concerning the specifics concerning this crime.

THE COURT: What did you do on October 8th?

DEFENDANT FONTAINE: I held the bank up.

THE COURT: What?

DEFENDANT FONTAINE: I held up the teller.

THE COURT: You held up a teller?

DEFENDANT FONTAINE: Yes, sir.

THE COURT: Did you take from him some $1,400.00 plus?

DEFENDANT FONTAINE: Yes, sir.

THE COURT: Any more?

MR. ZANGLIN: Was anyone with you when you committed this robbery?

THE COURT: He is charged with aiding and abetting Gregory Edward Lee.

MR. ZANGLIN: No, I think Edward Gregory Lee abetted him.

THE COURT: Aided and abetted by Edward Gregory Lee. That's the charge, do you understand that?

DEFENDANT FONTAINE: Yes, sir.

THE COURT: Is it your wish that the Court accept your plea?

DEFENDANT FONTAINE: Well, your Honor I wish you would accept my plea on the fact that I have never had a past record. I got strung up on the drugs and I started to make some money.

THE COURT: The Court will accept your plea and refer you to the Probation Department for a pre-sentence report.

MR. ZANGLIN: As to bond, we would recommend a $20,000.00 cash or surety bond.

THE COURT: It may be so ordered.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, vs. DAVID FONTANE DEFENDANT.	Cr. No. 44433

Proceedings had in the above-entitled matter before Honorable Fred W. Kaess, District Judge, at Detroit, Michigan, on Friday, February 13, 1970.

APPEARANCES:

HENRY MAHER, Esq.,
(Assistant United States Attorney)

Appearing on behalf of the United States of America

Detroit, Michigan
Friday, February 13, 1970

CLERK OF THE COURT: Number 44433, United States of America vs David Fontane.

THE COURT: You are Mr. David Fontane, sir?

DEFENDANT FONTANE: Yes, sir.

THE COURT: At the time of your plea you waived the appointment of counsel; is it your wish that you proceed here through sentence without being represented by counsel?

DEFENDANT FONTAINE: Yes, sir.

THE COURT: The maximum sentence in this matter is twenty five years, as you well know. Is there anything you wish to say prior to sentence being imposed upon you.

DEFENDANT FONTANE: Yes, I would like to say I would like to have the mercy of the Court.

THE COURT: Pardon me.

DEFENDANT FONTANE: I was under the influence of drugs when this happened. I would like to have mercy from the Court.

THE COURT: This isn't the time for your plea. How about your habit now?

DEFENDANT FONTANE: Well, I have been in jail five months.

THE COURT: Have you?

DEFENDANT FONTANE: Yes, your Honor. I think I have kicked it already.

THE COURT: You did plead to the charge of armed bank robbery.

DEFENDANT FONTANE: Yes, sir.

THE COURT: The Court takes all these things into consideration.

It is the sentence of this Court that the defendant be placed in the custody of the Attorney General for a period of twenty years under the provisions of Title 18, Section 4208(a) 2.

Are there any other counts on this?

MR. MAHER: No, there aren't, your Honor.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

DAVID X. FONTAINE, MOVANT,

vs.

UNITED STATES OF AMERICA.

Cr. Case No. 44433

ON MOTION TO VACATE AND SET ASIDE JUDGMENT OF CONVICTION AND SENTENCE IN CRIMINAL CASE NO. 44433 UPON THE GROUNDS THAT ALL PROCEEDINGS HERETOFORE ADJUDICATED IN SAID CRIMINAL CAUSE ARE NULL AND VOID AB INITIO AND IN TOTO AS IS ALLOWED AND AUTHORIZED UNDER TITLE 28, U.S.C., SECTION 2255.

MAY IT PLEASE THE COURT:

Movant herein, David Fontaine, in pro se, respectfully moves the Court in the above styled manner and in support thereof submits as follows:

STATEMENT OF THE CASE

On the night of October 21, 1969, movant was awakened from a sound sleep by a loud crash and the frightened screams of his wife and children. Movant noticed a man strugling with his wife and leaped to her rescue. Movant was thereupon clubbed into an unconscious state of mind. Movant was being dragged from his home when he regained consciousness. Movant, while dressed only in his underwear, was tossed into a police vehicle and taken to jail. Movant subsequently learned that the police had, without benefit of a search warrant or probable cause, had broken into his home, clubbed him into an unconscious state and hauled him off to jail, in his underwear, for the purpose of interrogating him. After reaching the police station, movant was handcuffed to a chair and interrogated about several crimes the police said movant had either committed or was involved in. Due to his physical and mental condition at the time of his interrogation movant does not remember very clearly what was said or what was asked of him. His most vivid memory is that one of the interrogation officers was named John Crookshank and that this officer struck movant several times with his fist and open

hands while movant was handcuffed to the chair. Said officer called movant "a nigger bastard" and promised to beat him to death if he didn't co-operate with the police. Movant, while befuddled, groggy, and in mortal fear of his life informed the police that he would say anything they wanted him to say. At the time of the interrogation movant began to bleed rather freely from a gunshotwound he had received a few days prior to his arrest and for which he had been bedridden at the time of his arrest. The brutal treatment administered to him by the arresting officers had torn open the wound which had been healing. Movant blacked out a couple of times during the interrogation but was revived by the police in order that he might answer their questions concerning several crimes they claimed movant had either committed or knew about. Movant, in mortal fear of the officers and suffering from severe pain asked that he be allowed to see a doctor and get some rest. Movant was told by the police that they might let him see a doctor if he co-operated with them and answered their questions but if he didn't co-operate he wasn't going to get anything but a bashed in head. Movant asked if he could call an attorney before being asked any more questions and was slapped in the face by detective Crookshank who informed movant that he was tired of all the stalling and if movant didn't start talking that he (detective Crookshank) was going to "bash his fuckin' head" with a billy club. While in mortal fear that his life was in danger of being forfeited, movant pleaded with the interrogating officers not to kill him and stated that he'd tell them anything he knew and would do whatever they asked of him. Thereafter said interrogating officers *told movant that he had committed numerous crimes and, how he had committed them.* Movant, not wanting to antagonize said officers agreed to anything they asked of him and signed several papers presented to him for his signature. Thereafter movant lost consciousness and when he regained his wits he was being admitted at the Detroit General Hospital. The admission sheets at said hospital reflects that movant was suffering from Heroin addiction, serum hepatitis, gunshot wound in right abdomen, hematoma of the right flank and a convulsive disorder. While in the hospital movant was interviewed and interrogated by state and federal police relative to the crimes and the alleged confessions movant

had made on the night of his arrest. Movant, while ill and mentally disturbed let the police intimidate and coerce him into an agreement to enter a plea of guilty to armed bank robbery. Movant was told that if he did not enter a plea of guilty to the bank robbery charge in federal court that he would be prosecuted in state court and sentenced to life imprisonment. Due to his severe illnesses and mental problems movant allowed the police to convince him that he was a bona fide bank robber and that unless he entered a plea of guilty in federal Court that he would have to stay in the Michigan State Prison for the remainder of his life. Movant was told that he and another man had robbed a teller at the Liberty State Bank in Hamtramack, Michigan of $1,400. Movant, while mentally ill and not in control of his faculties permitted the police to intimidate and coerce him into an agreement to enter a plea of guilty to the robbery of said bank . . . A crime of which movant possesses no knowledge of having ever committed, and a crime to which he was coerced into saying he had committed.

Movant submits that he has a severe mental problem and and that he suffers from epilepsy and a mental trauma of major proportions due to his having been shot in the head by the police when he was a teenager. Movant's fear of the police is such a strong psychological force it motivates his every reaction and destroys his will to resist their desires or commands. Movant holds a constant fear that the police will kill him if he does not obey their every whim or desire and it was this traumatic condition which motivated movant's mental apparatus when he allowed the police to coerce and intimidate him into entering a plea of guilty to a bank robbery. A crime movant did not commit.

Movant submits that following his arrest and arraignment upon the bank robbery charge that he was never before a *U.S. Commissioner* nor had the *advice* of *counsel* at any stage of the proceedings had.

Movant submits that he was beaten by the police for asking if he could talk to an attorney before being interrogated.

Movant submits that the police had conditioned his mind for the proceedings in Court and that he did not understand the consequences of his Constitutional waivers of counsel, Grand Jury and plea of guilty.

Movant submits that he is uneducated (7th grade). That

the legal terms used by the Court were complete jargon to movant and beyond his sphere of comprehension.

Movant submits that he was mentally ill at the time of his arraignment and that his plea of guilty and waiver of Constitutional safeguards was a product of his mental illness.

MOTION NOW MADE

Movant prays that this Honorable Court take judicial cognizance of the exhibits and brief of law annexed hereto and made a part of this proceedings and if not convinced that sufficient grounds exist for nullification of the Constitutional waivers entered in this cause that a plenary hearing be ordered whereby movant will be accorded an opportunity to present evidence and testimony in his behalf; that upon conclusion of such hearing that the Court make a finding of fact and a conclusion of law therefrom; that the judgment of conviction and sentence heretofore imposed in this cause be declared null and void ab initio and in toto. It is so prayed.

Respectfully submitted

this .... day of ....., 1971.

David X. Fontaine
Movant Pro se
Box P.M.B.
Atlanta, Ga. 30315

AFFIDAVIT

I, David X Fontaine, being duly affirmed and under oath, depose and affirm that the allegations of fact set forth in the foregoing motion are truee in all respects.

David X Fontaine
Affiant-Movant

Subscribed and affirmed to before me this 20 day of July, 1971.

Charles C. Moore
Notary Public

BRIEF OF LAW

I

Movant submits that a plea of guilty is more than a confession which admits that an accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment. *KERCHERAL V. UNITED STATES,* 274 U.S. 220.

II

The admissibility of a confession must be based on a reliable determination of the voluntariness of issues which satisfies the Constitutional rights of a defendant. *JACKSON V. DENNO,* 378 U.S. 368.

III

The question of an effective waiver of Federal Constitutional right in a proceeding is governed by federal standards. *CARNLEY V. COCHRAN,* 369 U.S. 506.

IV

Several federal Constitutional rights are involved in a waiver that takes place when a plea of guilty is entered: first is the privilege granted against compulsory self-incrimination guaranteed by the Fifth Amendment, U.S. Constitution; second is right to trial by jury; third is right to confront one's accusers; fourth is the right to indictment by a Grand Jury; and fifth is the right to competent counsel; a waiver of these five important federal rights cannot be presumed from a silent record. *SMITH V. UNITED STATES,* 360 U.S. 1; *BOYKIN V. ALABAMA,* 395 U.S. 238.

ARGUMENT

Movant submits that the arraignment proceedings had in this cause is of no force and effect when reviewed in their proper light. Movant had long been brainwashed, coerced and intimidated into entering his guilty plea before he was arraigned. The in Court formalities conducted by the Court

and Government counsel did not go behind the scene on a search for truth and in failing to do so may have provided a record technically legal upon its face but when said record is perused in the light of the truth such record becomes a mockery of justice.

The admissibility of a confession or a guilty plea induced from a confession obtained under physical and mental duress must be based on a "reliable determination of its voluntary aspects". *JACKSON V. DENNO,* 378 U.S. 368, 387, 84 S.Ct. 1774, 1786, 12 L.Ed. 2d 908.

In *MC CARTHY V. UNITED STATES,* 394 U.S. 459 the Supreme Court held that Rule 11, Fed. R.C.P. was designed to assist trial judges in making the Constitutionally required determination that a defendant's guilty plea is truly voluntary. See, e.g. *MACHIBRODA V. UNITED STATES,* 368 U.S. 487 (1962); *VON MOLTKE V. GILLIES,* 332 U.S. 708 (1948); *WALEY V. JOHNSON,* 316 U.S. 101; *WALKER V. JOHNSON,* 312 U.S. 275; *JOHNSON V. ZERBST,* 304 U.S. 458; cf. *SUNAL V. LARGE,* 332 U.S. 174.

In *Von Moltke,* supra, the Court held:

> "A waiver of the Constitutional right to the assistance of counsel is of no less moment to an accused who must decide whether to plead guilty than to an accused who stands trial." . . . See *WILLIAMS V. KAISER,* 323 U.S. 471, 475.

In the case at bar Movant's plea of guilty and conviction based thereon is the product of fear, coercion and mental illness.

In *BISHOP V. UNITED STATES,* 350 U.S. 961, the Court held that the conviction of a legally incompetent defendant violates due process.

In *PATE V. ROBINSON,* 383 U.S. 375, the Court again held that the fundamental concepts of due process are abused where the mentally ill are criminally prosecuted.

CONCLUSION

Movant submits that due process of law is sorely abused where, as in the case at bar, the police, acting without benefit *of warrant or probable cause,* smash in the doors of a citizens home in the dead of night and brutally assaults

such citizen and his wife, then drags such citizen off to jail in his underwear, cuffs him to a chair, beats him with clubs, blackjacks, kicks him, and tells him that unless he "cooperates" that his head will be bashed in, *denies* such citizen *access* to *legal counsel* . . .

Such tactics used to obtain confessions and criminal admissions are supposedly prohibited in a civilized nation but the conviction dealt with herein was obtained in the foregoing manner should be reversed.

Respectfully submitted

this .... day of ....., 1971.
David X. Fontaine
Movant Pro se

CITY OF DETROIT
JEROME P. CAVANAGH, *Mayor*

DEPARTMENT OF HEALTH
DETROIT GENERAL HOSPITAL
DETROIT, MICHIGAN 48226

DISCHARGE SUMMARY

NAME: David Fontaine
CASE NO.: 686365
SERVICE: Medicine, Ward 6-3
ADMITTED: 12/17/69
DISCHARGED: 1/6/70

FINAL DIAGNOSIS: Heroin addiction.
Serum hepatitis.
Old gunshot wound, right abdomen.
Convulsive disorder.

SECONDARY DIAGNOSIS: Rule out hematoma, right flank.

CHIEF COMPLAINT AND PRESENT ILLNESS: The patient is a 26-year-old negro male who is a prisoner and known heroin addict for the last two years. He came to the hospital because the patient was complaining of dark urine, yellowness in the eyes, anorexia, epigastric discomfort, nausea and vomiting approximately one week prior to admission. The patient has been in the jail for approximately 1½ months and during this period he didn't receive any heroin. Two months prior to admission the patient had a gunshot wound penetrating through the abdominal wall in the right upper quadrant. He has been complaining of right flank pain since then. Past history revealed a gunshot wound in the head in 1962. Since then he continued to have persistent headache and episodes of seizures. The patient was placed on Dilantin and Phenobarbital since then. Three to four days before admission the patient started having

dysuria, supra-pubic tenderness and fever with no chills, and also started having right flank pain.

PHYSICAL EXAMINATION: On admission showed a well-developed, well-nourished negro male, not in distress. Blood pressure 120/75, pulse 80 per minute. HEENT—pupils equal, regular, react to light; fundi within normal limits. Sclerae were icteric. Neck supple; no jugular vein distention. Thyroid not enlarged. Mouth showed gunshot wound hole in the superior palate. There was a scar in the right forehead. Chest—lungs clear to percussion and auscultation. Heart—normal sinus rhythm with no murmur. Abdomen was soft. There was a penetrating gunshot wound through the abdominal wall in the right upper quadrant. There was a fullness and tenderness in the right costovertebral angle. Also some tenderness in the supra-pubic area. Bowel sounds present. Liver, spleen and kidneys were not palpable. Extremities—there was no edema; all peripheral pulses were intact. Neurological examination showed no neurological deficit.

LABORATORY STUDIES: On admission, WBC 6,500, hemoglobin 14 grams %. Reticulocyte count 3.5%. Urinalysis—trace protein, sugar negative, WBC 8 to 16 per high powered field. Alkaline phosphatase less than 4% B. units. LDH 8,750, transaminase SGOT 786, urine culture showed few alpha strep and few staph epidermitis. Colony count less than 1,000. Subsequent urine culture showed no growth. Prothrombin time patient 13.8, control 12.6. Bilirubin was less than 1.2. Initial bilirubin total was 13.4. Bilirubin on 1/5/70, one day before discharge, was 1.4. Electrolytes—sodium 130 mEq/liter, potassium 4 mEq/liter, chloride 94, CO2 24.7. Repeated determination of the enzyme alkaline phosphatase, LDH and SGOT showed progressive lowering in the serum level. Finally the enzymes returned to normal on the day of discharge. Chest x-ray was normal. X-ray of the abdomen was normal. I.V.P. was normal.

HOSPITAL COURSE: The patient during his hospital course showed a smooth recovery and progressive improvement in his general condition. Serial determination of the bilirubin and the enzymes showing progressive lowering in the levels. Finally bilirubin and enzymes SGOT, LDH and alkaline phosphatase became normal before discharge. The

patient has been placed on a course of Ampicillin for urinary tract infection. Finally, patient was discharged in satisfactory condition to be followed in the Medical Clinic. Discharge medications were Multi-vitamins, Dilantin and Phenobarbital for convulsive disorder.

M. M. Al-Rawi, M.D.

W/O/#8
3/3/70

CITY OF DETROIT

JEROME P. CAVANAGH, *Mayor*

DEPARTMENT OF HEALTH
DETROIT GENERAL HOSPITAL
CENTRAL BRANCH
DETROIT, MICHIGAN 48226

DISCHARGE SUMMARY

ADMITTED: 10/21/69
DISCHARGED: 10/26/69

NAME: FONTAINE, David
CASE NO. 686365
SERVICE: Surgical III

FINAL DIAGNOSIS: Hematoma, right lumbar region abdominal wall.
SECONDARY DIAGNOSIS: Two-week-old gunshot wound, abdominal wall.
OPERATIONS PERFORMED: None.

Patient was admitted with a history of pain, right lumbar region with superficial swelling in abdominal wall of two weeks duration. Two weeks ago he had a gunshot wound of abdominal wall after which he developed this painful superficial swelling in the right lumbar region which has not been increasing in size, but the pain has been persistently there. When he came to the Emergency while he had the gunshot wound. At that time (there was) X-ray of the abdomen did not reveal any gas in the abdomen except that there was a small and superficial dense shadow in the right lumbar regional abdominal wall.

PHYSICAL EXAMINATION: Patient does have a very superficial swelling in the abdominal wall in the right lumbar region which is tender, not fluctuant, and extends around the area about 2 inches in diameter around the wound of exit. There is no organomegaly or there is no other tender spot in the abdomen. The rest of system examination of the patient is insignificant and is absolutely normal.

Urinalysis of the patient: Patient does have 3 to 4 RBC's in urine and otherwise the urine is normal. The IVP is normal and patient was put on antibiotics of Procaine Penicillin, 600,000 b.i.d. and Streptomycin, 1 gm. per day for about 5 days and a needle exploration of the area was done under aseptic precautions to find out whether there was any pus in that small superficial swelling. It was negative.

Patient is being discharged in good condition to be followed later on in the Clinic.

M. Gursahani, M.D.

10/28/69
w.o./#12

UNIVERSITY HOSPITAL

1200 West Leonard St.
Pensacola, Florida 32501
(904) 432-7632

January 22, 1971

James Ron Shelley
Public Defender
210 S. Palafox St.
Pensacola, Florida 32501

Re: Hubert Fountain, Jr.—Our file #41995

Dear Sir:

The records on the above mentioned person have been microfilmed, therefore, we will have to give you the information you need in the form of a letter.
He was in our hospital from 11/10/62 to 11/24/62 under the care of Dr. Tippins. Drs. Wolf and Rodewald did the actual surgery. The final Diagnosis was gun shot wound of head, also, 1. Fracture of right cranial bone and maxilla. 2. Fracture of floor of right frontal sinus. 3. Foreign body in right frontal sinus. 4. Depressed skull fracture right frontal area. He was discharged as improved, with a prognosis of good.

Operation: 1. Tracheotomy. 2. Removal of foreign bodies from right frontal sinus. 3. Elevation of deparesed fracture of right frontal sinus. The operative report shows that the gunshot wound entered the head at floor of the mouth and traveled through tongue, roof of mouth, nasal bones and nose and was lodged in frontal sinus.

Past History: Never been hospitalized before.

Present History: This patient was brought to Emergency Room after being shot by Police when trying to avoid arrest.

Hoping this is satisfactory, I am,

Yours truly,
Mrs. J. Leyrer
Medical Records

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DAVID X. FONTANE, PETITIONER, —VS— UNITED STATES OF AMERICA, RESPONDENT.	CIVIL NO. C36898 *MOTION TO DISMISS MOTION TO VACATE SENTENCE*

NOW COMES the United States of America by and through its attorneys Ralph B. Guy, Jr., United States Attorney, and Michael D. Gladstone, Assistant United States Attorney, both for the Eastern District of Michigan, and respectfully states as follows:

FACTS

Petitioner, David Fontane was charged in a one count Indictment with having been aided and abetted by one Gregory Edward Lee in the armed robbery of the Libert State Bank in violation of 18 U.S.C. §2113(d).

Subsequently, on November 13, 1969, petitioner was arraigned and at this proceeding pled guilty to the indictment. Consequently, petitioner was sentenced to be placed in the custody of the Attorney General for a period of Twenty years under the provisions of 18 U.S.C. §4208(a)2.

Petitioner's motion to vacate is essentially based on the claims that he was mentally incompetent to plea and that his plea was involuntary.

ARGUMENT

I. Petitioner was not mentally incompetant when he waived counsel and pleaded guilty.

Petitioner was specifically asked whether he desired court appointed counsel and answered that he wished to proceed without the assistance of counsel. Petitioner alleges that due to a gunshot wound seven years previously this waiver is void as is his plea of guilty.

During the entire arraignment the petitioner failed to mention or even infer any facts pertaining to his mental condition, past medical history, or drug addiction. He did respond to each question asked by the court and admitted he knew what he was doing.

The *Hayes* case requires from a petitioner specific facts regarding the alleged prior mental history or incidents of aberration to support the conclusory allegations. *Hayes v. United States,* 399 F.2d 691 (5th Cir., 1968); See also *Dranow v. United States,* 407 F.2d 47 (8th Cir., 1969); *Sanchez v. United States,* 401 F.2d 771 (2nd Cir., 1968).

A similar fact situation occurred in *Edwards v. United States,* 422 F.2d 788 (7th Cir., 1970). There the defendant, Edwards, after waiving counsel added, "but I would like to talk to somebody that has some maybe psychiatric training. . ." . The court was thereby alerted to this possible defense, and upon further questioning and observation of Edwards decided he was competant to plea.

In this case there is no warning given or incidents of prior aberration nor evidence of medical treatment by a psychiatrist. The medical report from University Hospital states no damage to petitioner's brain and a good prognosis after surgery.

It is respondent's position that petitioner has not borne his burden under the *Hayes* case.

II. Petitioner's plea of guilty was not involuntary.

This claim by petitioner is completely unsupported by the facts alleged. Petitioner covers three pages with unsubstantiated claims of coercion and maltreatment at the hands of the Detroit Police.

But a month after the above confrontation, when he was before the Federal judge not one word was uttered to the presiding judge of any abuse but instead petitioner affirmatively states that there had been no promises made nor had he been threatened.

The case of *Spears v. United States,* 250 F.Supp. 698 (S.D. W. Va. 1966) at page 701 presents the same issue as in this case: who is telling the truth. The Court cited the following rule: "The burden of proof resting upon him and the rules of credibility applying".

It is the government's position that again the burden borne by petitioner has not been satisfied.

Finally, respondent asserts that the requirements of Rule 11, Federal Rules of Criminal Procedure as adjudicated in *McCarthy v. United States,* 394 U.S. 459 (1969) were satisfied by the District Court. Petitioner admitted he understood the nature of the crime and the consequence of his plea on the record.

The petitioner would now two years later have this Court vacate his sentence upon the following record: petitioner voluntarily waived his rights; he asserted his guilt and requested mercy; he briefly described the commission of the crime; remained silent during the arraignment as to any alleged coercion or incompetancy; and declined his right of allocution.

If petitioner were to prevail upon this record then guilty pleas would be a farce and a means whereby an incarcerated felon could obtain a new trial after witnesses were wither dead or unlocatable, memories have faded, and evidence lost or destroyed.

CONCLUSION

It is respectfully prayed that in view of the foregoing this Court will deny and dismiss petitioner's Motion to Vacate Sentence.

Respectfully submitted,

RALPH B. GUY, JR.
United States Attorney

MICHAEL D. GLADSTONE
Assistant U. S. Attorney

Dated: October 6, 1971

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DAVID X. FONTAINE, PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

RE: *Civil No. C 36898*

TRAVERSE

Comes now, David X. Fontaine, the petitioner herein, and respectfully submits this Traverse in reply to the respondent's affidavit in opposition (dated Oct. 6, '71, received by petitioner Oct. 10, '71) to petitioner's motion for Sec. 2255 relief in Cr. No. 44433, forwarded to this Honorable Court, dated July 20, '71.

For the purpose of the record, petitioner asks the Court to take note that contrary to respondent's assertion under "Facts" that petitioner pleaded guilty to an indictment, that such assertion is contradicted by the record, to-wit: (pg. 2, Plea Transcript, Nov. 13, 1969):

THE COURT: You have received a copy of the *"information"* here, the charge here against you for armed bank robbery, is that right? (Emphasis mine).

DEFENDANT FONTAINE: Right.

Further examination of said page 2, will show petitioner "waived Grand Jury Indictment."

Petitioner could not competently or intelligently waive his right to counsel since petitioner was never advised by the Court of his *right to a jury trial* and *to be confronted by the witnesses against him;* under the circumstances, petitioner felt that the only function that would be required of counsel, would be to stand beside petitioner while petitioner plead guilty.

That petitioner was never advised of his trial and confrontation rights whereby he could understand the meaningfullness of representation by counsel, is clearly shown by the lack of advice to him in these matters, to-wit: (pgs. 2-3, Plea Transcript, supra):

THE COURT: The first thing of consequence is that you

have signed (sic) also a waiver of Grand Jury indictment which means you are entitled to have this matter first submitted to a Grand Jury and a determination made by that body and an indictment returned first; do you understand that and the rights you have thereunder? Anyway, that's what you will get if you wanted it to go to the Grand Jury.

DEFENDANT FONTAINE: Yes.

THE COURT: You have signed a waiver of that right, am I right?

DEFENDANT FONTAINE: Yes, Sir.

The dialogue between the Court and petitioner clearly shows the latter was not given any understanding by the former as to just what such a waiver encompassed. The failure of the Court to inform petitioner of his basic rights (of trial by jury and confrontation of witnesses) when taking a guilty plea pursuant to *Rule 11, Fed. Rules of Crim. Proc.*, is patently in violation of the mandate under *McCarthy* v. *United States,* 394 U.S. 459, and "automatic prejudice" ensues.

The Court continued its dialogue with petitioner in the following manner (pg. 3, supra):

THE COURT: In addition, you are entitled to be represented by an attorney and, if you are without funds with which to employ an attorney, the Court will appoint one for you. The Court has here before it a waiver of assignment of an attorney. Is it your wish to proceed here without an attorney?

DEFENDANT FONTAINE: I guess so.

THE COURT: You have got to know so.

DEFENDANT FONTAINE: Yes, Sir.

The irony of the whole proceedings aforerecited, is that petitioner was given a handful of "waivers" to sign *BEFORE* the Court made any attempt to advise him in any manner. Thus, as far as petitioner was aware, such waivers were binding on him and any further proceedings were mere formality, especially where, as here in his instant case, no effort was made to inform him that such waivers were not binding if he desired counsel (or trial by jury for that matter).

There is nothing in the record to indicate petitioner's waivers of basic constitutional rights to trial, counsel and confrontation were competently or intelligently taken, and it is axiomatic under American Jurisprudence that for waiver of constitutional rights to be effective, it must clearly be established that there was "an intentional relinquishment or abandonment of a known right or privilege." See, *Johnson* v. *Zerbst*, 304 U.S. 458 (1938); *Brookhart* v. *Janis*, 384 U.S. 1, 86 S.Ct. 1245 (1966). The waiver must be intelligent and competent. See, *Cross* v. *United States*, 325 F.2d 629 (D.C. Cir., 1963).

The respondent claims that:

> "In this case there is no warning given or incidents of prior aberration * * *"

Yet, when we examine page 6, of the Plea Transcript, we find when petitioner tended to explain his circumstances, he stated:

> "I got strong up on drugs * * *"

There should be no argument that a person addicted to drugs is mentally and physically ill and is unable to function in the "norm." Such statement of addiction on petitioner's part was sufficient warning to the Court that petitioner's mental capabilities might well have been impaired, causing him to incompetently waive basic rights and plead guilty to a charge of a 25 year maximum (which the Court readily gave him 20 years of).

Respondent further claims the requirements of Rule 11, *supra*, as adjudicated in *McCarthy*, *supra*, were satisfied; Respondent stating: (quote)——

> "Petitioner admitted he understood the nature of the crime and the consequences of his plea on the records." (unquote)

In view of respondent's assertion, it is necessary to examine the record and see whether petitioner was even advised of the "nature" of the crime, much-less understand it. Hence, we move to page 4, of the Plea Transcript and examine the following dialogue between the Court and petitioner dealing with the "nature of the charge" issue: (quote)——

THE COURT: Do you understand the nature of the charge? Do you know what you are charged with?

DEFENDANT
FONTAINE: Yes, I know what I am charged with.
THE COURT: What are you charged with?
DEFENDANT
FONTAINE: Bank robbery.
THE COURT: Armed.
DEFENDANT
FONTAINE: Armed Bank robbery.
THE COURT: On October 8th.
DEFENDANT
FONTAINE: Right. I don't know too much about the law because I have never been in Court before.
THE COURT: I just what to know that you know what you are doing.

(end of quote)

The gravamen of the offense charged in the information was that petitioner robbed the Liberty State Bank, 930 Joseph Campau, Hamtramack, Michigan, *"the deposits of which were then insured by the Federal Deposit Insurance Corporation."*

Since United States District Courts have no common law jurisdiction in criminal cases, See: *Section 3231, Title 18 U.S.C.A.; Jerome* v. *United States,* 318 U.S. 101, at 106, 107 *United States* v. *Hudson,* 7 Cranch (11 U.S.) 32, 3 L.Ed 259, and *United States* v. *Coolidge,* 1 Wheat. (14 U.S.) 415 4 L.Ed. 124, the "nature" of the charge in petitioner's instant case was not "armed bank robbery," for it is an essential element of an offense under Section 2113, Title 18 U.S.C.A., that the institution robbed be a "bank" as defined in Section 2113 (f). *King* v. *United States,* 426 F.2d 27 (1970), and the term "bank" as applied in Section 2113 (a) is defined in subsection (f) of Section 2113, to include (1) any member bank of the Federal Reserve System, (2) any bank operating under the laws of the United States, and (3) any bank the deposits of which are insured by the Federal Insurance Corporation. See: *Schoepflin* v. *United States,* 391 F.2d 390, 396, note 5 (1968).

At no time, during the pleadings or sentencing proceedings against petitioner, did the Court define the bank in question as being F.D.I.C. insured, nor at any time during said proceedings was any "Organization Certificate" produced, and the lack of such certificate shows a lack of jurisdiction on the part of the Court to accept a guilty plea to

what may not have even been a federal offense, especially where, as here, *no judicial notice was taken by the Court as to the "National Character" of the bank in question.* Compare: *King* v. *United States, supra.*

The "Organization Certificate" goes to the factual basis as well as the jurisdictional basis of whether the offense in question was of a federal nature.

Petitioner respectfully submits, *that the bank in question* in his instant case *did not have a charter number at the time of the alleged robbery, and did not have any as of September 13, 1971,* when upon petitioner's request for same made to the Federal Deposit Insurance Corporation, a search for such Corporation's records *showed NO CHARTER* (ORGANIZATION CERTIFICATE) *for the bank in question—The Liberty State Bank.*

Petitioner can produce documentary proof to such effect, plus additional proof that F.D.I.C. *does not insure against robberies;* such insurance being provided by "private insurance companies."

Under the circumstances of this instant case, petitioner's guilty plea was nothing more than a farce, devoid of due process and Rule 11 safeguards as adjudicated in *McCarthy, supra,* and petitioner is entitled to *McCarthy* relief.

In view of the foregoing, petitioner respectfully prays that the Honorable Court grant the Motion to Vacate.

Respectfully submitted,

David X. Fontaine 27801
Petitioner, pro se

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil No. 36898

OPINION AND ORDER DENYING MOTION TO VACATE SENTENCE

At a session of said court held in the Federal Building in the City of Detroit, Michigan, on the 7th day of December, 1971.

PRESENT: The Honorable FRED W. KAESS, United States District Judge.

The court has before it a motion to vacate sentence filed by David X. Fontaine, an inmate of the United States penitentiary at Atlanta, Georgia. At his arraignment the petitioner pleaded guilty to having been aided and abetted by another in the armed robbery of a bank in violation of Title 18, U.S.C., § 2113(d). As a result, he was sentenced to a term of twenty years in the custory of the Attorney General, pursuant to the provisions of Title 18, U.S.C., § 4208(a)2.

In challenging the validity of his conviction the Petitioner alleges that he was mentally incompetent to plead and that his plea was thus involuntary. The respondent has answered the petition by filing a motion to dismiss.

The petitioner specifically alleges that his plea was the product of fear, mental illness, drug addiction, and coercive police tactics. In addition he contends that he failed to understand the consequences of waiving counsel and pleading guilty. A review of the entire record, however, fails to substantiate these claims. Each time the court offered petitioner the assistance of counsel prior to acceptance of his plea, such offer was declined. It is apparent from the record that petitioner was interrogated on the question of the voluntariness of his plea, that he understood his right to a Grand Jury indictment, that he understood the nature of the charge against him, that no promises were made to him, and that he understood the maximum penalty he could receive. As such, the court clearly conformed to the re-

quirements of Rule 11 of the Federal Rules of Criminal Procedure, as dictated by *McCarthy v. United States,* 394 U.S. 459 (1969), in accepting petitioner's plea as voluntary. When the trial court has so questioned the accused about pleading guilty, the petitioner cannot now be heard to collaterally attack the record and deny what was said in open court. *United States v. Davis,* 319 F.2d 482 (C.A. 6, 1963); *United States v. Orlando,* 327 F.2d 185 (C.A. 6, 1964), cert. denied 379 U.S. 825. Decisions of the United States Supreme Court also reflect this rule. See *Brady v. United States,* 397 U.S. 742 (1970); *McMann v. Richardson,* 397 U.S. 759 (1970). Therefore, petitioner's instant claims are without merit and do not warrant relief.

In view of the foregoing, IT IS ORDERED that the motion to vacate sentence be and the same is hereby DENIED.

FRED N. KAESS
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CIVIL No. 36898

TO: CLERK OF COURT:

Comes now David X. Fontaine, in per se, and assigns as error pursuant to Notice of Appeal heretofore filed in this Court from the order of Hon. Fred W. Kaess entered on December 8, 1971, denying Motion to Vacate Conviction pursuant to Title 28 U.S.C. § 2255.

ERROR (ONE)

That the trial Court erred in its arbitrary and capricious denial of fundamental issues of law set forth in defendant-appellant's motion de hors the record.

The contention of the Court that . . . "A review of the entire record, however, fails to substantiate these claims . . ."

Trial Courts may not resort to now existent records to deny material questions of law submitted de hors the records.

In the case sub judice the Trial Court argues that a mentally incompetent is capable of understanding the nature of his charge and all of the intricate legal ramifications surrounding the taking of waivers of Constitutional rights to indictment, counsel, and what constitutes a valid plea of guilty.

The official medical records submitted with defendant-appellant's motion to Vacate clearly and fordefully presents a prima facie cause of action which required the Court to grant a plenary hearing, accord petitioner an opportunity to sustain the burden of proof required to substantiate the material allegations set forth in his motion.

If the contentions of the Court are to be sustained there is no remedy available whereby a mentally ill defendant may collaterally attack an illegal conviction.

ERROR (TWO)

The Court erred in its failure to accord defendant-Appellant an opportunity to be fully and properly heard upon material infringements of constitutional rights which tran-

spired outside the presence of the Court and the Court reporter. This plain error and impermissable as a matter of law.

RECORDS DESIGNATED ON APPEAL

1. Transcript of Arraignment and Sentence.
2. Motion to Vacate Pursuant to Title 28 U.S.C. Section 2255.
3. Governments Motion To Dismiss.
4. Petitioner's Traverse.
5. Order of Court Denying Motion to Vacate.
6. Notice of Appeal.
7. Assignment of Errors.
8. Designation of Records.
9. All Court Minutes.
10. Pre-Sentence Report.
11. All Medical Records Made exhibits with Motion to Vacate under 28 U.S.C. § 2255.

Done this 28th day of Dec., 1971.

/s/ David X. Fontaine 27801-138
Appellant-Defendant
Box P.M.B.
Atlanta, Ga. 30315

No. 72-1060

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAVID X. FONTAINE, Petitioner-Appellant vs UNITED STATES OF AMERICA, Respondent-Appellee	ORDER

Before WEICK, EDWARDS and KENT, Circuit Judges.

Upon consideration of the appeal, it appearing to the Court that in accepting appellant's plea of guilty to the information charging him with armed bank robbery the District Court fully complied with Rule 11, Fed.R.Crim.P., and determined that his plea was wholly voluntary, that his plea was not made as a result of any threats, and that he was not under the influence of drugs at the time,

It is therefore ORDERED that the judgment of the District Court be and it is hereby affirmed.

ENTERED BY ORDER OF THE COURT.

JAMES A. HIGGINS
Clerk

SUPREME COURT OF THE UNITED STATES

No. 71-6757

DAVID X. FONTAINE,
PETITIONER,

v.

UNITED STATES

On petition for writ of Certiorari to the United States ..... Court of Appeals for the Sixth ..... Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the pe'ition for writ of certiorari be, and the same is hereby, granted.

NOVEMBER 6, 1972

☆ U.S. Government Printing Office: 1972—489-457/327

JAN
MICHAEL RODAK,

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-6757

DAVID X. FONTAINE,

Petitioner,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-6757

DAVID X. FONTAINE,

Petitioner,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

OPINION BELOW

The court of appeals affirmed the district court by order without opinion. (A. 34). The opinion of the district court is reprinted in the Appendix. (A. 30-31).

JURISDICTION

The judgment of the court of appeals was entered on April 21, 1972. The petition for a writ of certiorari was filed on June 1, 1972 and granted on November 6, 1972. The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I. Was petitioner entitled to an evidentiary hearing under 28 U.S.C. §2255 upon allegations that: (a) his uncounseled plea and waiver of counsel were produced by police coercion; (b) he was mentally incompetent at the time of the plea?

II. Do the principles of the "guilty plea trilogy," *McMann v. Richardson, Brady v. United States,* and *Parker v. North Carolina*, justify denial of the §2255 motion in this case without a hearing?

III. Assuming trial court compliance at plea with the minimum requirements of Rule 11, Fed.R.Crim.P., does such compliance *per se* foreclose the right to a §2255 hearing upon a collateral claim of coercion?

IV. (a) Was petitioner's plea invalid for want of a valid waiver of counsel on the face of the record?

(b) Should this Court, under its federal supervisory power, preclude the uncounseled guilty plea, or require that no waiver of counsel is valid unless the pleading defendant has at least once considered the waiver with counsel?

CONSTITUTIONAL PROVISION, STATUTE, AND RULE INVOLVED

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Section 2255 of Title 28 provides in relevant part:

> §2255. Federal custody; remedies on motion attacking sentence
>
> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and

make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

* * * *

Rule 11 of the Federal Rules of Criminal Procedure provides:

A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

STATEMENT

This case concerns a federal prisoner's collateral attack upon a guilty plea entered without counsel. Petitioner, David Fontaine, filed a *pro se* motion to vacate his sentence under 28 U.S.C. §2255 alleging, with details and documentation, that his plea and waiver of counsel were the direct product of police coercion upon a disturbed mind. Although the United States Attorney did not deny petitioner's factual allegations, the district court denied the §2255 motion without taking evidence. Relying upon the plea-taking procedures under Rule 11, Fed.R. Crim.P., *McCarthy v. United States*, 394 U.S. 459, and the principles this Court set forth in *Brady v. United States*, 397 U.S. 742 and *McMann v. Richardson*, 397 U.S. 759, the district court determined that a prisoner who had been examined at plea in accord with Rule 11 "cannot now be heard to collaterally attack the record and deny what was said in open court." (A. 31)

The conviction petitioner attacks was obtained against him in November 1969 upon his *uncounseled* plea of guilty to a one-count information charging a federal armed bank robbery one month earlier. 18 U.S.C. §2113(d). Petitioner, still unrepresented, was then sentenced in February to a term of twenty years. 18 U.S.C. §4208(a)(2).

His §2255 motion alleges substantially as follows: About three weeks prior to his plea, local Detroit police unlawfully broke into his home, awakened him and his family and clubbed him into unconsciousness before taking him to jail for interrogation. At the jail, he was handcuffed to a chair and abused, physically and verbally, during interrogation about several crimes. One officer called him a "nigger bastard" and threatened "to beat him to death if he didn't cooperate . . . . " (A. 10)

At the time of this interrogation, petitioner was suffering from an abdominal gunshot wound received two weeks earlier, which began to bleed as a result of police maltreatment. When he asked for a doctor, the police conditioned permission upon "cooperation". Petitioner's subsequent request for a lawyer was met with a slap in the face and a warning that, unless he talked, more physical abuse would follow. Finally, he "agreed to anything they asked of him and signed several papers . . . . " (A. 10)

Then petitioner fainted and woke up at a Detroit hospital. A "Discharge Summary" attached to the §2255 motion shows that petitioner was admitted to that hospital on the night of his arrest with a two-week old gunshot wound and was discharged five days later. (A. 19-20)

The §2255 motion alleges further that, during petitioner's hospital stay, interrogation resumed and that "while ill and mentally disturbed [he] let the police intimidate and coerce him into an agreement to enter a plea of guilty to armed bank robbery," a crime he did not commit. (A. 11) He was told that unless he pleaded guilty in federal court he would be prosecuted in state court and sentenced to life imprisonment. And he was propelled to acquiesce in the guilty plea by "a constant fear that the police will kill him if he does not obey". (A. 11) This fear derived from an adolescent experience in 1962 in which police shot him in the head. This 1962 wound led to persistent epilepsy and other mental problems that were still operative at the time of the plea and contributed to its involuntariness.

In support of the foregoing allegations, petitioner also attached to the 2255 motion another "Discharge Summary" arising from a second hospitalization during his

incarceration after plea, but prior to sentencing. This document evidences a history of headache and seizures since 1962 for which petitioner was placed on Dilantin and Phenobarbital. It also reflects petitioner's persistent pain from the abdominal gunshot would prior to plea, a present condition of serum hepatitis, and symptoms of heroin withdrawal in jail. (A. 16-18)

Finally, petitioner alleges that he "never had the advice of counsel at any stage of the proceedings," (A. 11) and with his seventh grade education he could not comprehend the "jargon" at the plea proceeding.

Accordingly, the upshot of petitioner's §2255 motion is that, at the time of plea, petitioner was so mentally disturbed and "conditioned" (A. 11) by the police for the proceedings in Court that his waivers of counsel and trial were the unintelligent and involuntary product of a coerced and disturbed state of mind. In addition, the motion alleges that petitioner was mentally incompetent at the time of plea.

The United States Attorney moved to dismiss petitioner's motion but did not deny any of the factual allegations pertaining to police coercion or mental disturbance. (A. 22-24) Like the district court and the court of appeals to follow, the motion to dismiss did no more than rely upon attached court transcripts and Rule 11 to dispose of petitioner's claims.[1]

[1] The two courts below relied only upon the plea proceedings. (A. 30-31, 34) The United States Attorney looked also to the proceedings at sentence (A. 8) to suggest that petitioner was silent even at this stage as to any police abuse. (A. 23) But at sentencing petitioner was asked no questions that might have elicited such a response and, indeed, he was all but told that it was too late to discuss the plea at that point. "This isn't the time for your plea." (A. 8)

Since the Rule 11 proceeding relied upon was quite short, we set it forth here in its entirety.[2]

Proceedings had in the above-entitled matter before Honorable Fred W. Kaess, District Judge at Detroit, Michigan, on Thursday, November 13, 1969.

APPEARANCES:

JOSEPH ZANGLIN, Esq.
(Assistant United States Attorney)
Appearing on behalf of the United States of America

THE CLERK OF THE COURT: The United States of America vs David Fontaine.

MR. ZANGLIN: Your Honor, this is an arraignment on an information charging the defendant with armed bank robbery. He's been given a copy of the Information. He acknowledges that he understands it and knows what the maximum penalty is.

I have explained to him his right to an indictment by a Grand Jury. He has waived that right and signed a waiver of Rights Form.

He understands that he has a right to an attorney at this time and he informs me that he wants to waive that right and has signed a waiver of that right. Knowing all of these rights he informs me that he intends to plead guilty to the information.

THE COURT: You are Mr. David Fontaine?

DEFENDANT FONTAINE: Yes, sir.

THE COURT: You have received a copy of the information here, the charge here against you for armed bank robbery, is that right?

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[2]The one-page sentencing proceeding which is the only other pre-motion part of the record is set forth in the Appendix. (A. 8)

DEFENDANT FONTAINE: Right.

THE COURT: The first thing of consequence is that you have signed also a waiver of Grand Jury indictment which means you are entitled to have this matter first submitted to a Grand Jury and a determination made by that body and an indictment returned first; do you understand that and the rights you have thereunder? Anyway, that's what you will get if you wanted it to go to the Grand Jury.

DEFENDANT FONTAINE: Yes.

THE COURT: You have signed a waiver of that right, am I right?

DEFENDANT FONTAINE: Yes, sir.

THE COURT: In addition, you are entitled to be represented by an attorney and, if you are without funds with which to employ an attorney, the Court will appoint one for you. The Court has here before it a waiver of assignment of an attorney. Is it your wish to proceed here without an attorney?

DEFENDANT FONTAINE: I guess so.

THE COURT: You have got to know so.

DEFENDANT FONTAINE: Yes, sir.

THE COURT: Are you aware of the maximum penalty in this case? Not that you will get it because I don't know nor does anyone else what the penalty will be, but the maximum penalty under your plea if you do plead, is 25 years and/or $10,000.00 fine; do you understand that?

DEFENDANT FONTAINE: Yes, sir.

THE COURT: You understand the maximum penalty?

DEFENDANT FONTAINE: Yes, sir.

THE COURT: Knowing all these things, is it your wish then that—are you prepared to plead now?

DEFENDANT FONTAINE: Yes, sir.

THE COURT: How do you plead, sir.

DEFENDANT FONTAINE: Guilty.

THE COURT: With respect to your plea of guilty has anyone made any promise to you of any kind with respect to this matter in order for you to offer your plea of guilty here?

DEFENDANT FONTAINE: No, sir.

THE COURT: No one has threatened you?

DEFENDANT FONTAINE: No, sir.

THE COURT: Do you understand the nature of the charge? Do you know what you are charged with?

DEFENDANT FONTAINE: Yes I know what I am charged with.

THE COURT: What are you charged with?

DEFENDANT FONTAINE: Bank robbery.

THE COURT: Armed.

DEFENDANT FONTAINE: Armed bank robbery.

THE COURT: On October 8th?

DEFENDANT FONTAINE: Right. I don't know too much about the law because I have never been in Court before.

THE COURT: I just want to know that you know what you are doing.

DEFENDANT FONTAINE: Yes, sir.

THE COURT: Is it your wish that the Court accept your plea of guilty here to this offense of armed bank robbery?

DEFENDANT FONTAINE: Yes, sir.

THE COURT: Did you actually do that?

DEFENDANT FONTAINE: Yes, sir.

THE COURT: Did you actually attempt to rob a bank, or did, I guess you did, of some $1,400.00?

DEFENDANT FONTAINE: Yes, sir.

THE COURT: Are you knowingly and freely and voluntarily offering your plea of guilty here?

DEFENDANT FONTAINE: Yes, sir.

THE COURT: I want to be sure that you know what you are doing. You are pleading guilty to armed bank robbery occurring on October 8th of the Liberty State Bank in Hamtramck.

DEFENDANT FONTAINE: Yes, sir.

THE COURT: And by the use of a gun, pistol, right?

DEFENDANT FONTAINE: Right.

MR. ZANGLIN: Your Honor, I would suggest that the Court ask the defendant to put on the record some of his own statements concerning the specifics concerning this crime.

THE COURT: What did you do on October 8th?

DEFENDANT FONTAINE: I held the bank up.

THE COURT: What?

DEFENDANT FONTAINE: I held up the teller.

THE COURT: You held up a teller.

DEFENDANT FONTAINE: Yes, sir.

THE COURT: Did you take from him some $1,400.00 plus?

DEFENDANT FONTAINE: Yes, sir.

THE COURT: Any more?

MR. ZANGLIN: Was anyone with you when you committed this robbery?

THE COURT: He is charged with aiding and abetting Gregory Edward Lee.

MR. ZANGLIN: No, I think Edward Gregory Lee abetted him.

THE COURT: Aided and abetted by Edward Gregory Lee. That's the charge, do you understand that?

DEFENDANT FONTAINE: Yes, sir.

THE COURT: Is it your wish that the Court accept your plea?

DEFENDANT FONTAINE: Well, your Honor I wish you would accept my plea on the fact that I have never had a past record. I got strung up on the drugs and I started to make some money.

THE COURT: The Court will accept your plea and refer you to the Probation Department for a pre-sentence report.

MR. ZANGLIN: As to bond, we would recommend a $20,000.00 cash or surety bond.

THE COURT: It may be so ordered.

SUMMARY

I. Congress intended the statutory motion to vacat sentence, 28 U.S.C. §2255, to be a remedy "as broad a habeas corpus." *United States v. Hayman*, 342 U.S. 205 217. This Court's cases confirm that habeas corpus wa traditionally available to challenge guilty pleas as coerced See *e.g., Walker v. Johnston*, 312 U.S. 275. They sho too that an evidentiary hearing was required in habea whenever material allegations of fact were in dispute without regard to the probability that a coercion claim sufficient in law, would be sustained in fact. *Waley v Johnston*, 316 U.S. 101.

Congress embodied the same requirements in §225 when it provided that a "hearing" must be granted unles

it "conclusively" appears from the "motion and the files and records of the case" that no relief is possible. In *Machibroda v. United States*, 368 U.S. 487, and *Sanders v. United States*, 373 U.S. 1, these standards were reaffirmed by this Court even where a defendant accompanied his plea with statements inconsistent with his allegations on collateral attack. Accordingly, the statements of a defendant at plea do not "conclusively" dispose of a later motion. This conclusion is particularly compelling where the very claim on collateral attack is that the plea, and accompanying statements, were the direct product of police coercion.

In this case, petitioner's factual allegations of direct coercion are not specifically denied, much less "conclusively" rebutted. Accordingly, he was wrongfully denied a hearing below.

Petitioner Fontaine was unrepresented by counsel from arrest through custody and plea. This Court has steadfastly taken "special care" to scrutinize pleas entered by uncounseled defendants. This approach was reasserted in the "guilty plea trilogy": *McMann v. Richardson*, 397 U.S. 759; *Brady v. United States*, 397 U.S. 742; *Parker v. North Carolina*, 397 U.S. 790. The trilogy emphasized the reasonable advice of counsel as insulating a guilty plea from various collateral claims that it was coerced. The cases specifically except from such insulation instances where the pleading defendant was uncounseled or later claimed that his guilty plea was the direct product of police coercion. Thus, to the extent the trilogy is relevant, it confirms the need for collateral review in uncounseled cases.

Mere compliance at plea with the minimum requirements of Rule 11, Fed.R.Crim.P., likewise does not justify summary denial of a §2255 attack based upon

direct coercion. The judicial inquiries prescribed by that Rule, and enforced in *McCarthy v. United States*, 394 U.S. 459 are minimum requirements for the acceptance of any plea. No plea is valid without such compliance. But although an expansive inquiry under that Rule might "facilitate" disposition of collateral claims, it cannot dispose "conclusively" of subsequent claims of direct coercion. Particularly is this true when the inquiry under the Rule is as perfunctory and ritualistic as it was here. Indeed, in this case the failure to explain the federal element of the offense at plea might even be taken to rebut compliance with the Rule.

Moreover, if Rule 11 compliance is held to bar collateral relief, §2255 is not, as promised, as broad a remedy as habeas corpus. In habeas, a hearing is required where the "material facts were not adequately developed" at a prior hearing. That standard for a mandatory hearing was announced in *Townsend v. Sain*, 372 U.S. 293, 313, and held applicable under §2255 in *Kaufman v. United States*, 394 U.S. 217, 227.

II. Although an evidentiary hearing on his §2255 motion is the least that is required in this case, this Court should order petitioner's motion granted upon the existing record. That record fails to show a valid waiver of counsel at plea and, under the Sixth Amendment, no uncounseled plea can survive that record inadequacy. *Johnson v. Zerbst*, 304 U.S. 458, 468; *Boykin v. Alabama*, 395 U.S. 238; *Carnley v. Cochran*, 369 U.S. 506. This record does not even show an unequivocal rejection of an offer of counsel, much less the other prerequisites of a valid waiver—an "intelligent" and "voluntary" decision. Indeed, this "waiver" falls below any standard developed either by this Court or the courts of appeals, see *e.g., United States ex rel Miner v.*

Erickson, 428 F.2d 623 (8th Cir. 1970). The trial court here did not inform the defendant that counsel could be useful in considering whether to plead, emphasize the seriousness of the offense, ask why the defendant did not want counsel, reoffer counsel when signs of doubt appeared, or make any inquiry whatever into whether the defendant understood the consequences of the waiver. Whatever the proper standard of judicial inquiry, this bareboned proceeding cannot pass muster under the Sixth Amendment.

Finally, this Court should adopt, under its supervisory power, a rule barring any uncounseled guilty plea, or requiring as a minimum that such a plea be preceded by counseled consideration of a proposed waiver. Such a rule has been endorsed in the States and elsewhere, serves a recognized interest of justice, and is a vital step in the development of a guilty plea process that is resistant, if not immune, to collateral attack.

ARGUMENT

I. UNDER 28 U.S.C. §2255 AND THIS COURT'S PRECEDENTS, PETITIONER WAS ENTITLED TO AN EVIDENTIARY HEARING.

The principal claim advanced in petitioner's §2255 motion is that his guilty plea and accompanying waivers were coerced. The motion alleges police abuse and intimidation during a three-week period beginning at arrest, continuing through hospitalization, and carrying over to taint the uncounseled plea proceedings. Petitioner portrays, in short, "a stream of events" with an unbroken coercive impact which came to dominate his weakened mind at an uncounseled plea. See *Darwin v. Connecticut*, 391 U.S. 346, 349 (confession); *Clewis v. Texas*, 386 U.S.

707, 710 (confession); *Chambers v. Florida*, 309 U.S. 227, note 2 (confession and plea); *Pennsylvania ex rel Herman v. Claudy*, 350 U.S. 116 (confession and uncounseled plea). The specific factual allegations of coercion stand unrebutted and are stated with sufficient detail and documentation to "show that his version of events, if true, would require the conclusion that his [guilty plea] was involuntary." *Procunier v. Atchley*, 400 U.S. 446, 451. Moreover, nothing in the motion or "the files and records of the case conclusively show[s] that the prisoner is entitled to no relief. . . ." 28 U.S.C. §2255.

In this posture, petitioner was wrongfully denied his right to a hearing conferred by the statutory command of §2255 and a solid body of this Court's case law.

A. The Statute

As a matter of statutory construction, coerced plea claims come easily within the ambit of the motion procedure. A prisoner contending that his guilty plea was coerced is "claiming the right to be released upon the ground that [his] sentence was imposed in violation of the Constitution . . . of the United States." 28 U.S.C. §2255. *Kercheval v. United States*, 274 U.S. 220. *Pennsylvania ex rel Herman v. Claudy*, 350 U.S. 116. *Machibroda v. United States*, 368 U.S. 487. When such a claim is tendered, §2255 speaks of the right to a hearing in mandatory terms: A court in receipt of such a motion "shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." A narrow exception to the mandatory hearing requirement is provided for those instances in which "the motion and the files and records of the case *conclusively* show that the prisoner is entitled to no relief. . . ." 28 U.S.C. §2255 (emphasis supplied)

B. The Case Law

This Court's cases show beyond question that petitioner's motion commands a hearing under the broad statutory right and lies beyond the scope of the narrow exception. Historical perspective is useful in establishing that conclusion.

There can be no doubt that coerced plea claims were historically heard in federal habeas corpus and meant to be heard under §2255 after Congress enacted it in 1948. This Court so observed in the foundation case of *United States v. Hayman,* 342 U.S. 205, sustaining the motion procedure afforded by §2255 against the contention that it "amounted to an unconstitutional 'suspension' of the writ of habeas corpus. . . ." 342 U.S. 205, 209. The *Hayman* Court concluded that §2255 raised no question of suspension, for Congress intended it to provide "a remedy . . . as broad as habeas corpus". 342 U.S. at 217.

> Nowhere in the history of 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions. On the contrary, the sole purpose [of §2255] was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum. 342 U.S. at 219.

And the *Hayman* Court specifically noted that habeas corpus would traditionally have been available to "challenge . . . convictions on facts dehors the record" showing that a guilty plea had been coerced.[3] 342 U.S. at 212 and

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[3]This Court has specifically endorsed the mode of analysis by which reference is made "to our decisions respecting the availability of the federal habeas remedy in deciding the question" of what claims can be raised under §2255. *Kaufman v. United States,* 394 U.S. 217, 220.

note 12. Indeed, the *Hayman* opinion gave prominence to *Walker v. Johnston*, 312 U.S. 275, as a case involving a coerced plea claim, traditionally heard in habeas, that could more conveniently be heard in a §2255 proceeding. Like petitioner Fontaine, Walker had been convicted upon an uncounseled plea of guilty to a charge of federal armed bank robbery. 312 U.S. at 279-80. Years later, he filed in federal habeas corpus upon the ground of coercion and was denied relief without a hearing. The *Hayman* Court recalled that

> In the Northern District of California, Walker alleged that he had been denied counsel and coerced into pleading guilty by the United States Attorney, his assistant and a deputy marshal in the Northern District of Texas. The District Court for the Northern District of California refused to grant the writ after receiving ex parte affidavits from the federal officers denying the allegations. This Court reversed, finding that Walker's application raised material issues of fact and holding that the District Court must determine such issues by the taking of evidence, not by ex parte affidavits. 342 U.S. 213.

The *Hayman* Court then went on to suggest that Congress now intended such claims as Walker's to be heard under §2255 at the situs of the sentencing court. 342 U.S. 213-14. And carrying the habeas parallel forward, the Court made clear, much as it had in *Walker*, that the §2255 substitute likewise required a judicial hearing to resolve factual disputes.

> In requiring a "hearing" [2255] "has obvious reference to the tradition of judicial proceedings." 342 U.S. at 220.

In between *Walker* and *Hayman*, this Court decided *Waley v. Johnston*, 316 U.S. 101, also cited in *Hayman*, 342 U.S. at note 12, which at once confirms and

advances the historical understanding. Waley, like Walker, also filed in federal habeas to challenge his prior guilty plea with specific allegations of coercion. By contrast with *Walker*, however, the Government's return in *Waley* included, as here, a transcript of the proceedings on arraignment, plea and sentence. The transcript disclosed that the trial court had advised Waley of his right to counsel and, indeed, had appointed counsel who represented Waley at plea. The return alleged by affidavit that Waley had also voluntarily signed two confessions; but, as here, no specific denial of the coercion allegations was set forth. The federal habeas court denied the petition without hearing evidence, finding inconsistencies in petitioner's allegations and observing that the transcript "showed that petitioner was neither 'actuated nor induced by fear' . . . ."[4] 316 U.S. at 103. The court of appeals affirmed this summary denial upon a ground reminiscent of the decisions below in this case. The court reasoned that a *counseled* plea of guilty " 'waived the defense and the constitutional right, if any he had, and [he] cannot assert it now on habeas corpus proceedings.' " 316 U.S. at 103-14.

In this Court, the Solicitor General confessed error, 316 U.S. at 104, "for the reason that the habeas corpus petition raises the material issue whether the plea was in fact coerced by the particular threats alleged which stand undenied on the record, and that upon that issue petitioner is entitled to a hearing in accordance with *Walker v. Johnston*. . . ." 316 U.S. at 104.

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[4] An additional ground involving *res judicata* was also ruled upon and ultimately rejected by this Court. 316 U.S. at 103, 105.

This Court accepted the confession of error in *Waley* in language that speaks importantly to the scope of the right to a federal habeas hearing prior to §2255.[5]

> True, petitioner's allegations in the circumstances of this case may tax credulity. But in view of their specific nature . . . and the failure of respondent to deny them specifically, we cannot say that the issue was not one calling for a hearing within the principles laid down in Walker v. Johnston. If the allegations are found to be true, petitioner's constitutional rights were infringed. For a conviction on a plea of guilty coerced by a federal law enforcement officer is no more consistent with due process than a conviction supported by a coerced confession. Bram v. United States, 168 U.S. 532 . . . ; And if his plea was so coerced as to deprive it of validity to support the conviction, the coercion likewise deprived it of validity as a waiver of his right to assail the conviction. Johnson v. Zerbst, 304 U.S. 458 . . .[6]

As of the enactment of §2255, then, this Court's decisions limiting summary denial in federal habeas corpus had virtually come to the very language Congress

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[5]During the pre-2255 period, this Court also decided a parallel guilty plea case holding that allegations of involuntariness by state prisoners require a hearing in state habeas corpus. *Smith v. O'Grady*, 312 U.S. 329 (1941).

[6]It is unclear from petitioner Fontaine's motion whether federal or state officers are charged with coercion. It would appear that local police arrested him, but that by the time of his first hospitalization, federal and state "police" were involved. The motion alleges that Fontaine "was told that if he did not enter a plea of guilty to the bank robbery charged in federal court that he would be prosecuted in state court and sentenced to life imprisonment." (A. 11) For constitutional purposes, however, the question of which authority performed the alleged coercion is irrelevant. *Cf. Elkins v. United States*, 364 U.S. 206.

chose to limit such denials in the new motion procedure. A hearing must be held "[u]nless the motion and the files and records of the case *conclusively* show that the prisoner is entitled to no relief. . . ." (emphasis supplied) 28 U.S.C. §2255.

The major decisions of this Court following the enactment of the motion procedure firmly carry this understanding forward. In 1962, *Hill v. United States*, 368 U.S. 424, confirmed that the new motion was intended to provide a "remedy *exactly commensurate* with that which had previously been available by habeas corpus in the . . . district where the prisoner was confined." 368 U.S. 424, 427. (emphasis supplied)

And the companion case to *Hill, Machibroda v. United States*, 368 U.S. 487, spoke with clarity to the limited power of summary denial in guilty plea cases. Machibroda, represented by retained counsel, had pleaded guilty to two charges of federal bank robbery. At the arraignment, he admitted that his pleas were voluntarily given. 368 U.S. at 500. Three years later, however, he moved under 28 U.S.C. §2255 upon the grounds, *inter alia*, that his pleas of guilty had not been voluntary and that the court had accepted them without first "determining" their voluntariness under Rule 11, Fed.R. Crim.P.[7] 368 U.S. at 489.

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[7]In 1962, Rule 11 provided, as it does now, see p. 37 *infra* that the trial court "shall not accept" a guilty plea without first "determining that the plea is made voluntarily. . ." The amendment of the Rule in 1966 added, *inter alia*, that the determination is to be made by "addressing the defendant personally." See Advisory Committee Notes to Rule 11, Fed.R.Crim.P.

The motion set forth detailed factual allegations of unfulfilled promises of leniency in exchange for a plea, as well as prosecutorial threats of reprisal if Machibroda disclosed the bargain to his lawyer. 368 U.S. at 489-90. The motion alleged further by affidavit that Machibroda had subsequently written two letters to the sentencing court complaining of the prosecutor's misrepresentations. 368 U.S. at 490. The Government's return specifically denied by affidavit any promises or coercion. And the sentencing judge, who had also taken the plea, 360 U.S. at 496, noted of his own knowledge that he had never received either of the two letters referred to, but had received a letter from Machibroda, asking for concurrent sentences, which conspicuously failed to mention any agreement with the prosecutor. 368 U.S. at 492-3. Relying as well upon other inconsistencies in the movant's allegations, the court denied the motion without a hearing.[8]

This Court reversed and remanded for the taking of evidence. Relying chiefly upon *Walker*, *Waley* and *Hayman*, Mr. Justice Stewart concluded that

> the District Court did not proceed in conformity with the provisions of 28 U.S.C. §2255 when it made findings on controverted issues of fact without

[8] As the dissent in this Court observed, 368 U.S. at 498-99, there were a variety of other circumstances tending to belie Machibroda's allegations: *e.g.*, (1) he had three times appeared before the court subsequent to the alleged "deal" without making any reference to it; (2) at the time of alleged promises, he had already agreed to waive indictment on the more serious robbery and had represented to the court, through his attorney, the possibility of a second waiver; and (3) before the alleged deal was to be performed, he gave testimony at a companion trial unfavorable to the Government.

> notice to the petitioner and without a hearing. 368 U.S. at 494.

Conspicuously, the Court did not say that Machibroda's admission of "voluntariness" at arraignment barred his subsequent motion. Neither did it say that if the Rule 11 voluntariness determination were shown to have been made by the Court, Machibroda's further allegations of extra-judicial coercion could not be entertained. Indeed, the opinion observes that the factual allegations of the motion

> related primarily to purported occurrences outside the courtroom and upon which the record could, therefore, cast no real light. Nor were the circumstances alleged of a kind that the District Judge could *completely resolve* by drawing upon his own personal knowledge or recollection. (emphasis supplied) 368 U.S. at 494-95.

Since a Rule 11 voluntariness determination would have been within the District Judge's recollection, *Machibroda* must have contemplated that even if such a determination had been made, a factual hearing was required to "completely resolve" the totality of the movant's factual allegations of coercion.[9]

To be sure, the *Machibroda* Court acknowledged that there might be some claims of such a nature that a full hearing with the movant present in the court might not be required.

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[9] The dissenting opinion likewise observed that the majority had held it "necessary to go outside the files and records to discover the truth of the matter." 368 U.S. at 497 (Clark, J.) A full discussion of the impact of Rule 11 on petitioner's right to a §2255 hearing is presented at pp. 36-47 *infra*.

> "Indeed, the statute itself recognizes that there are times when allegations of facts outside the record can be fully investigated without requiring the personal presence of the prisoner." 368 U.S. at 495.

But a hearing may be denied altogether only when, in this Court's words, the movant's allegations are not merely "improbable" but "incredible". 368 U.S. at 496.

This standard does no more than implement the narrow exception of the statute permitting a denial without hearing only when it is "conclusively" apparent "that the prisoner is entitled to no relief." And this Court's reading of that narrow exception continues to fulfill its promise in *Hayman,* for after *Machibroda* it is as true for §2255 as for habeas that:

> "The Government's contention that . . . allegations are improbable and unbelievable cannot serve to deny . . . an opportunity to support them by evidence." *Walker, supra* at 287. See also *Waley, supra* at 104.

Diehard doubts about how narrow the "conclusively" exception is were laid to rest in *Sanders v. United States,* 373 U.S. 1. Like petitioner Fontaine, Sanders had pleaded guilty to federal bank robbery without counsel. He too responded to the court's inquiry at plea by stating that he wished to waive counsel, indictment and trial. He did not appeal, but subsequently filed two successive motions under §2255. The first motion alleged, *inter alia,* that he had been coerced to plead in the absence of counsel, but it presented no factual detail. It was denied summarily, both as barren of factual allegations, and as "conclusively" rejected by the files and records of the case. 373 U.S. at 5. The second motion contended, this time in detail, that Sanders was mentally incompetent at plea as the result of narcotic addiction. This motion was

likewise summarily denied, in part upon *res judicata* principles and in part as "without merit in fact." 373 U.S. at 6.

This Court reversed and required a hearing. The opinion focuses principally upon an issue not present here—the criteria for determining when a summary denial is proper upon successive motions.[10] 373 U.S. at 15-19. But this Court in *Sanders* also disposed of the trial court's contention that the files and records "conclusively" rejected Sanders' allegations of incompetence. The language of this Court's disposition so clearly compels reversal in this case that it is worth quoting in full:

> But the 'files and records of the case' including the transcript [of the plea], could not 'conclusively show' that the claim alleged in the second motion entitled [Sanders] to no relief. . . . . However regular the proceedings at which he signed a waiver of indictment, declined assistance of counsel, and pleaded guilty might appear from the transcript, it still might be the case that petitioner did not make an intelligent and understanding waiver of his constitutional rights. [citations]. For the facts on which petitioner's claim in his second application is predicated are outside the record. This is so even though the judge who passed on the two motions was the same judge who presided at the hearing at which petitioner made the waivers, and the later hearing at which he was sentenced. Whether or not petitioner was under the influence of narcotics would not necessarily have been apparent to the trial judge. Petitioner appeared before him without

[10] That issue is not presented here, but the principles discussed do have some relevance to this case and are touched upon at pp. 46-47 *infra*.

> counsel and but briefly. That the judge may have thought he acted with intelligence and understanding in responding to the judge's inquiries cannot 'conclusively show', as the statute requires, that there is no merit in his present claim. *Cf. Machibroda v. United States*. . . .[11] 373 U.S. at 19-20.

In reaching the conclusion that the transcript of th plea proceeding could not be taken as "conclusive refutation of the motion, *Sanders* articulated one furth factor vital to this case. Like Fontaine, Sanders ha waived a lawyer at plea. After such an uncounseled pl proceeding, there is an added need for a fair collater hearing.

> Very possibly, the proceeding was constitutionally adequate. But by its summary nature, and because defendant was unrepresented by counsel, a presumption of adequacy is obviously less compelling than it would be had there been a full criminal trial. Moreover, the nature of the proceeding was such as to preclude direct appellate review. In such a case it is imperative that a fair opportunity for collateral relief be afforded. An applicant for such relief ought not to be held to the niceties of lawyers' pleadings or be cursorily dismissed because his claim seems unlikely to prove meritorious. That his application is vexatious or repetitious, or that his claim lacks any substance, must be fairly demonstrated. 373 U.S. at 22.[12]

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[11] The opinion of this Court also observes that, like Fontain Sanders had alerted the trial court to the existence of a dr problem and had been receiving withdrawal treatment prior sentence. 373 U.S. at 20.

[12] In the same Term as *Sanders*, this Court decided *Townsend Sain*, 372 U.S. 293, whose criteria for a mandatory hearing habeas corpus were held fully applicable under §2255. See *Kau man v. United States*, 394 U.S. 217, 226-27. At least two *Townse*

C. The Principles Applied

1. *The Coercion Claim*

On this record, it cannot be maintained that petitioner's allegations of coercion as to the plea and accompanying waivers are "conclusively" refuted by the "motion" itself or the "files and records of the case." 28 U.S.C. §2255. Indeed, nothing before this Court establishes that petitioner's allegations are so "incredible," 368 U.S. at 496 that anything less than a full evidentiary hearing is permissible under the statute.

On the contrary, the Government's response to the motion does not so much as deny any specific factual allegation of police abuse or overreaching.[13] Reliance is placed instead upon petitioner's responses at the plea proceeding. At that proceeding, petitioner denied the existence of threats and responded affirmatively to the question, "Are you knowingly and freely and voluntarily offering your plea of guilty here?" (A. 4-5).

But these are the very responses petitioner contends were coerced from him. Accordingly, it would thoroughly beg the question to say that they "conclusively' rebut the coercion claim. This Court has roundly denied any such conclusive effect to like expressions of voluntariness in confessions challenged as coerced. For "common sense dictates the conclusion that if the authorities were successful in compelling the totally

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criteria compel a hearing here, for the "merits of the factual dispute were not resolved" in any prior federal hearing; nor were "the material facts . . . adequately developed" at any such hearing. 372 U.S. at 313.

[13] By analogy to the procedure in habeas corpus, such undenied allegations might be taken as true, *Cf.* 28 U.S.C. §2448.

incriminating confession of guilt, the very issue for determination, they would have little, if any, trouble securing the self-contained concession of voluntariness."[14] *Haynes v. Washington,* 373 U.S. 503, 513. See also *Chambers v. Florida,* 309 U.S. 227.

This is precisely the point in *Sanders, supra,* as well. "However regular the proceedings at which he signed a waiver of indictment, declined assistance of counsel and pleaded guilty might appear from the transcript, it still might be the case that petitioner did not make an intelligent and understanding waiver of his constitutional rights." 373 U.S. at 19-20. As long as "it still might be," this Court's cases demand that petitioner's claim be heard.

Indeed, as long ago as *Waley v. Johnston, supra,* this Court provided the definitive answer to the Government's contention that petitioner's responses at plea conclusively rebut his later claims and defeat his right to a hearing. For "if his plea was so coerced as to deprive it of validity to support the conviction, the coercion likewise deprived it of validity as a waiver of his right to assail the conviction." 316 U.S. at 104.[15]

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[14] The courts of appeals have adopted similar principles. See *e.g., United States ex rel McGrath v. LaVallee,* 319 F.2d 308, 314 (2nd Cir. 1963) (hearing held despite denial of promise at plea); *Smith v. United States,* 223 F.2d 750 (5th Cir. 1955) (hearing held despite denial of coercion at trial); *United States v. McCarthy,* 433 F.2d 591, 593 (1st Cir. 1970) (acknowledging likelihood of denial by coerced defendant); *Hilliard v. Beto,* 465 F.2d 829 (5th Cir. 1972) (*Santobello* requires hearing even if denial of promises at plea.)

[15] Other contentions that might be advanced may weaken the credibility of petitioner's allegations but they do not "conclusively" dispose of them. For example: (1) petitioner did not attack his plea until a year and half after conviction. But the

2. *The Incompetence Claim*

Petitioner's motion alleges that "he has a severe mental problem and that he suffers from epilepsy and a mental trauma of major proportion due to his having been shot in the head by the police when he was a teenager." This early experience, he avers, induced in him a "fear of the police" that was "such a strong psychological force" that his mind was "conditioned . . . for the proceedings in Court." As a result, "he did not understand the consequences of his Constitutional waivers of counsel, Grand Jury and a plea of guilty." (A. 11) In addition, he is "uneducated (7th grade)" and found "the legal terms used by the Court . . . complete jargon . . . and beyond the sphere of his comprehension." (A. 12) Accordingly, petitioner's §2255 motion concludes that he "was mentally ill at the time of his arraignment and that his

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statute itself provides that a "motion for such relief may be made at any time," 28 U.S.C. §2255 and this Court has granted relief after longer delays. *Machibroda v. United States, supra,* (three years), *Palmer v. Ashe,* 342 U.S. 134 (eighteen years, state habeas), *Pennsylvania ex rel Herman v. Claudy,* 350 U.S. 116 (eight years, state habeas). In any event, such a timeliness claim may be heard on remand if the Government attempts to show "abuse of remedy." *Sanders, supra* at 17.

(2) Petitioner's own "Discharge Summary" attached to the motion fails to mention the physical abuse alleged or to report signs of it, although he was admitted to the hospital on the same evening as the abuse allegedly occurred. Again, this "omission" goes to credibility but does not demolish it. Moreover, the hospital, whose principal concern was the gunshot wound, could easily have disregarded superficial signs of abuse even if petitioner were sufficiently relieved of his fear of the police to have brought such abuse to medical attention. In fact, however, the motion does not allege that police maltreatment produced any bruises or lesions.

plea of guilty and waiver of Constitutional safeguards was a product of his mental illness." (A. 12)

In support of these allegations, the motion attaches two hospital documents, (A. 16-18) (A. 21) attesting to the teenage gunshot wound and the persistence of "headache and episodes of seizures." (A. 16) One of these documents, compiled upon his discharge from the Detroit General Hospital after plea but prior to sentencing, discloses that petitioner was discharged for return to jail with medication for "convulsive disorder." It also confirms that petitioner had been in jail continuously after arrest and had been experiencing heroin withdrawal symptoms. (A. 16)

These allegations may well be taken as part of the coercion claim. Indeed the motion alleges that "it was this traumatic condition which motivated movant's mental apparatus when he allowed the police to coerce and intimidate him into entering a plea of guilty to bank robbery." (A. 11)

To the extent that they allege mental "incompetence" at plea, however, they are sufficient to state a separate basis for a hearing under §2255.[16] *Sanders v. United*

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[16] In *Hayes v. United States*, 399 F.2d 691 (5th Cir. 1968), relied upon by the Government below, the court held that a §2255 motion alleging mental incompetence at plea may be summarily denied in the absence of "some specific facts regarding the claimed prior mental history, background, or incidents of aberration to support the conclusory allegations. . . ." The Sixth Circuit endorses the same rule, *Hartman v. United States*, 310 F.2d 447, 448 (6th Cir. 1962). It is implicit in the requirement that a motion state more than "bald legal conclusions." *Sanders, supra* at 19. The hospital documents in this case satisfy the rule. If they are deemed insufficient, however, the district court should "direct petitioner to amend his motion. *Sanders, supra* . . 19.

States, supra; Bishop v. United States, 350 U.S. 961 (§2255); *Dusky v. United States,* 362 U.S. 402; *Pate v. Robinson,* 383 U.S. 375.

II. THE PRINCIPLES OF THE GUILTY PLEA TRILOGY–McMANN, BRADY AND PARKER–SUPPORT THE RIGHT TO A HEARING IN UNCOUNSELED CASES

The district court found support for its summary denial here in the principles of *McMann v. Richardson*, 397 U.S. 759 and *Brady v. United States*, 397 U.S. 742. These cases were said to "reflect" the rule that the door to collat[illegible]al attack is closed by a judicial inquiry at plea such as that conducted in this case. In no way, however, do *Richardson* and *Brady*, or their companion, *Parker v. North Carolina*, 397 U.S. 790, "reflect" any such rule, or defeat by any other route petitioner's right to a hearing.

On the contrary, the distinguishing characteristics of the trilogy–the presence of counsel and the absence of claims of direct coercion–only highlight the merit of this petitioner's right to be heard.

The central problem considered in *Richardson* was the contention that a collateral hearing is required whenever it is alleged that an "otherwise valid guilty plea" was "motivated by *a prior coerced confession*." 397 U.S. at 760. (emphasis supplied). Richardson and other defendants in that case had all been advised by counsel at and prior to plea. In post-conviction petitions each alleged that his guilty plea would not have been entered "but for" prior coerced confessions. Each *Richardson* defendant also tendered other claims of more direct plea coercion or inadequacy of counsel. Each collateral attack was denied in the trial court, without a hearing, typically

for the reason that "a voluntary plea of guilty entered on advice of counsel constitutes a waiver of all non-jurisdictional defects in any prior stage of the proceedings against the defendant." 397 U.S. at 762.

The Court of Appeals reversed, requiring a hearing both as to the plea coercion claims arising from prior coerced confessions and as to those claims of more direct plea coercion or ineffective assistance of counsel.

This Court divided the difference. It upheld the trial court summary denials as to the prior confession claims, but declined to disturb the Court of Appeals' judgment that a hearing was required for the other claims.[17] 397 U.S. at 774-75.

The heart of this Court's reasoning is simply put:

> In our view a defendant's plea of guilty *based on reasonably competent advice* is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession. . . . We hold, therefore, that a defendant who alleges that he pleaded guilty because of a prior coerced confession is not, *without more*, entitled to a hearing on his petition. . . ." 397 U.S. at 770-71. (emphasis supplied)

In reaching that result, the *Richardson* Court carefully excepted from its holding cases such as this one:

> "Neither do we have before us the uncounseled defendant, see *Pennsylvania ex rel v. Claudy* . . . nor the situation where the circumstances that coerced the confession have abiding impact and also taint the plea *Cf. Chambers v. Florida*, . . . It is not

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[17] The presence of the complicating *Jackson v. Denno* issue in *Richardson* is without relevance here.

disputed that in such cases a guilty plea is properly open to challenge." 397 U.S. at 767.

Upon that reasoning, the case at bar presents a guilty plea which is "properly open to challenge." The Court has before it a petitioner, uncounseled at any stage.[18] He does not allege a prior coerced confession "but for" which he would have demanded trial. His claim instead is that, although innocent, he pleaded guilty only under direct police coercion manifest in a stream of events whose coercive impact upon his disturbed mind was sustained through the plea itself.

In such a case, it cannot be determined "conclusively," without a hearing, that the plea was either voluntary or intelligent. Since Fontaine had no counsel at all, he had no "reasonably competent advice," 397 U.S. at 270, or, indeed any advice "within the range of competence demanded of attorneys in criminal cases," 397 U.S. at 771, sufficient to insulate the plea. Nor can the alleged "waiver" of counsel at plea perform as a substitute. For the "waiver" itself is alleged to be the direct product of continuing coercive influence. Petitioner's allegations therefore compel a hearing no less than the claims of direct coercion in *Richardson*.

Brady v. United States, 397 U.S. 742, dictates the same result. Brady pleaded guilty to kidnapping under the federal statute whose death penalty scheme this Court found unconstitutional nine years later in *United States v. Jackson*, 390 U.S. 578. Like the petitioners in *Richardson*, Brady was "represented by competent counsel throughout." *Id.* At his plea, the court inquired into

[18] On this record, petitioner's allegation is undisputed that "he was never before a U.S. Commissioner nor had the advice of counsel at any stage of the proceedings had." (A. 11)

voluntariness and renewed that inquiry at sentencing where Brady declined the court's specific invitation to withdraw his plea.[19] 397 U.S. at 743 and note 2. Years later, Brady sought relief by a § 2255 motion alleging involuntariness upon a variety of grounds, none of which charged direct police or prosecutorial coercion. The lower court afforded a full hearing but denied relief. 397 U.S. at 748.

This Court affirmed. It focused principally upon one ground of alleged coercion. Brady had contended that *any* guilty plea is coerced if motivated by *any* fear generated by the death penalty scheme later found unconstitutional in *Jackson*. This Court rejected that contention for reasons like those in *Richardson*. Counsel's failure to appreciate that, nine years later, the penalty scheme would be declared unconstitutional was, like decisions not to challenge the confessions in *Richardson*, within the range of reasonable legal competence. 397 U.S. at 757.[20]

In so deciding, this Court elaborated its reliance upon counsel's advice in terms that come home here. It recognized the long-standing dual requirement "that guilty pleas are valid only if both 'voluntary' and 'intelligent.' " 397 U.S. at 747. And with respect to those requirements, the Court observed that its own practice required "special care" in cases of uncounseled pleas:

> "Since an intelligent assessment of the relative advantages of pleading guilty is frequently impossible

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[19] By contrast, the trial court here cut off all inquiry into the plea at sentencing. (A. 8)

[20] In addition, Brady had been advised by counsel and was found, after full hearing, to have been motivated by considerations other than the penalty scheme.

> without the assistance of an attorney, this Court has *scrutinized with special care* pleas of guilty entered by defendants without the assistance of counsel and without a valid waiver of the right to counsel. 397 U.S. at 748, note 6. (emphasis supplied)

In the case at bar, *Brady's* expression of "special care" could only have been ignored. For the district court read that case to "reflect" a rule denying scrutiny even to a claim that a waiver of counsel had been coerced.[21]

Parker v. North Carolina, 397 U.S. 790, confirms that the guilty plea trilogy is no barrier to petitioner. Parker had retained counsel shortly after confession and was represented by him through a guilty plea. Like petitioner Fontaine, Parker denied in court that his plea was the product of threats, promises, or other compulsion. In his collateral attack, however, Parker contended, like Richardson, that his plea was coerced by a prior coerced confession; and like Brady, by an unconstitutional penalty scheme. 397 U.S. at 790 and note 3. After a full hearing, relief was denied and this Court confirmed that Parker's plea was both voluntary and intelligent. Significantly, however, this Court did not hold that Parker's "voluntariness" responses at plea were dispositive of his later coercion claims. 397 U.S. at 795. Instead, it relied

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[21] The *Brady* discussion of *Bram v. United States*, 168 U.S. 532, likewise "reflects" this Court's pointed recognition that the circumstances of an uncounseled accused deserve special scrutiny:

> "*Bram* dealt with a confession given by a defendant in custody, alone and unrepresented by counsel. In such circumstances, even a mild promise of leniency was deemed sufficient to bar the confession, not because the promise was an illegal act as such, but because defendants at such times are too sensitive to inducement and the possible impact on them too great to ignore and too difficult to assess." 397 U.S. at 754.

again upon the presence and reasonable advice of counsel, 397 U.S. at 792-98, among a totality of circumstances, to reject Parker's claims.

Richardson, Brady and *Parker* thus do not diminish in any way the solid body of case law in this Court that otherwise establishes petitioner's right to a hearing under § 2255. On the contrary, the guilty plea trilogy stands to reaffirm the need for special scrutiny in uncounseled cases. See also *North Carolina v. Alford*, 400 U.S. 25, 31.

III. THE PROCEEDINGS AT PETITIONER'S PLEA DO NOT DISPOSE CONCLUSIVELY OF HIS COLLATERAL CLAIM OF INVOLUNTARINESS

Clearly the principal justification offered below for summary denial in this case was the district court's alleged conformity "to the requirements of Rule 11 of the Federal Rules of Criminal Procedure, as dictated by *McCarthy v. United States*, 394 U.S. 459 (1969), in accepting petitioner's plea as voluntary." (A. 30-31) For reasons previously advanced, see pp. 27-28 *supra*, neither a defendant's naked denial of threats nor his abstract averment that a plea is "voluntary" can serve conclusively to dispose of a post-conviction claim that a plea, including those responses, was coerced.

Bare compliance with the requirements of Rule 11, Fed.R.Crim.P., does not serve that purpose either.[22] And

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[22] Circuits other than the Sixth Circuit have denied conclusive effect to a Rule 11 proceeding. See *e.g., Walters v. Harris*, 460 F.2d 988, 992 (4th Cir. 1972); *Reed v. United States*, 441 F.2d 569, 572 (9th Cir. 1971); See also *Barber v. United States*, 427 F.2d 70, 71 (10th Cir. 1971) (pre-1966 Rule 11; no hearing because no allegations "outside the record.")

nothing in *McCarthy v. United States, supra*, holds that it does.[23]

In pertinent part, Rule 11 provides:

> A defendant may plead not guilty, guilty or, with the consent of the court nolo contendere. The court may refuse to accept a plea of guilty, and shall not accept such pleas or a plea of nolo contendere without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. . . . The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

The holding of *McCarthy* with respect to Rule 11 was carefully and narrowly defined by this Court:

> ". . . we hold that a defendant is entitled to plead anew if a United States district court accepts his guilty plea without fully adhering to the procedure provided for in Rule 11." 394 U.S. 463-64.

The *McCarthy* Court was not called upon to, and did not, hold that if the minimum procedures prescribed in the Rule are followed, that will forever foreclose all subsequent inquiry into the subjects (*e.g.*, voluntariness) dealt with in the Rule. In explicit language, the Court declined even to prescribe "general guidelines" for plea proceedings, save to indicate that "the nature of the inquiry required by Rule 11 must necessarily vary from case to case" and that "[i]n all such inquiries . . . 'reality, and not mere ritual should be controlling.' " 394 U.S. at

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[23] Since the plea in this case was taken on November 13, 1969, after the date of decision in *McCarthy*, of April 2, 1969, the holding of that case is applicable here. *Halliday v. United States*, 394 U.S. 831.

467, note 20. Instead, the *McCarthy* Court examined only the requirements that Rule 11 imposes upon the plea proceeding and held only that the entire proceeding is voidable by a defendant if the minimum procedural safeguards of the Rule are not accorded. That is to say, if a plea is to be valid *at all*, the court accepting it must address the defendant personally with respect to three subjects: (a) that the plea is made voluntarily, (b) that it is made with understanding of the nature of the charge and (c) that it is made with understanding of its consequences.[24] If such personal inquiry is omitted with respect to any one of the three subjects, the defendant is entitled to plead anew.

The petitioner McCarthy, represented by retained counsel, had pleaded guilty to "wilfully and knowingly" attempting to evade tax payments. At plea, his counsel informed the court that he had advised McCarthy of the consequences of the plea and the court's own inquiry confirmed that the defendant knew that his plea would entail waiver of trial and exposure to a stated punishment. The court also complied with a second requirement of Rule 11 by eliciting the defendant's statement that no threats had induced the plea and that it was being entered voluntarily. 394 U.S. at 461, 473.

But the trial court did not address the defendant personally to determine whether he understood the

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[24] The requirement that the court find "a factual basis for the plea" need not be satisfied by direct inquiry of the defendant. Notes of Advisory Committee, Rule 11, Fed.R.Crim.P. See *McCarthy, supra,* at note 6. This is a salutary rule since a mandatory personal inquiry might deter pleas by those who decline to admit the facts but wish to plead nonetheless. See *North Carolina v. Alford, supra.*

nature of the charge which required specific intent—a "knowing and willful" attempt to evade. 394 U.S. at 470-1. At sentencing, McCarthy and his counsel urged that his acts had been merely negligent or inadvertent, under the influence of a serious drinking problem. If so, as this Court later observed, McCarthy may have been guilty of only a lesser included offense. 394 U.S. at 471. On appeal, the defendant contended, *inter alia*, that his plea was invalid by reason of the district court's failure to address him personally and determine that he understood the nature of the charge. But the Court of Appeals sustained the plea, implying that Rule 11 did not always require such personal inquiry. 394 U.S. at 463. This Court reversed, rejecting the Government's argument that under Rule 11 the district court could properly have *assumed* the defendant's understanding from his expressed volition to plead and his understanding of the consequences of the plea.

In demanding strict compliance with each requirement of Rule 11, this Court addressed the purposes of the Rule in terms that relate the plea proceeding to the question of post-conviction attack presented here. The Court observed first that Rule 11 "is designed *to assist* the district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary." (emphasis supplied) 394 U.S. at 465. Notably, it did not say that the defendant's admission of voluntariness conclusively disposes of that issue. Secondly, the Court explained that

> the Rule is intended to produce a complete record at the time the plea is entered of the factors relevant to this voluntariness determination. Thus, the more meticulously the Rule is adhered to, the more it tends to discourage, or at least to enable more expeditious disposition of, the numerous and often

> frivolous post-conviction attacks on the constitutional validity of guilty pleas. 394 U.S. at 465.

Accordingly, the *McCarthy* Court made clear that Rule 11 was designed with an eye to its impact upon subsequent collateral attack—to discourage such attacks and to expedite treatment of them. But the Court did not hold that simple compliance with the requirements of Rule 11 forecloses *per se* all collateral inquiry.

The *McCarthy* treatment of that relationship amplifies understanding. With respect to relatively simple issues such as the defendant's "understanding of the nature of the charge," it may well be possible to rebut "conclusively," 28 U.S.C. § 2255, a collateral claim of ignorance on that point by a fully developed record at plea. If a defendant at plea explicitly confirms "his understanding of the essential elements of the charge" 394 U.S. at 467-8, note 20, particularly where lesser offenses are encompassed, a § 2255 court may well be able to determine, without an evidentiary hearing, that a subsequent claim of ignorance is "conclusively" refuted by the "files and records" of the case.[25] As to this subject in particular, the *McCarthy* Court observed:

> There is no adequate substitute for demonstrating *in the record at the time the plea is entered* the defendant's understanding of the nature of the

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[25] See *e.g.*, *United States v. Woosley*, 440 F.2d 1280 (8th Cir. 1971). This will be particularly true if a defendant is asked questions that call for his own expression of the charges rather than "Yes" or "No" answers. *Woosley*, *supra* at 1281. See the recommendation of the American Bar Association Project, *Standards Relating to Providing Defense Services*, p. 63 (Approved Draft, 1968).

charge against him.[26] (emphasis in original) 394 U.S. at 470.

The ultimate question of the "voluntariness" of the plea, however, presents another kind of problem. And although not called upon to decide that issue, the *McCarthy* Court's careful language reflects its sensitivity to the difference. Nowhere does this Court suggest that a defendant's denial of threats or affirmation of "voluntariness" at plea will conclude the "voluntariness" issue forever. To be sure, no plea can be valid at all unless the defendant is addressed on that subject and expresses his voluntary decision to plead. Absent such an inquiry, a defendant can obtain appellate reversal of the judgment without more.[27] But it does not follow that the voluntariness determination at plea is sufficient "conclusively" to dispose of detailed collateral allegations of coercion.[28]

[26] It is possible, of course, for a prisoner subsequently to allege "incompetence" at plea in order to challenge his apparent "understanding" reflected on the Rule 11 record. But such claims are more difficult to fabricate without at least some pre-existing hint of "incompetence" in the record. Frequently, they can be denied without a hearing as insufficiently particularized to warrant further evidence. See *e.g., Hayes v. United States,* 399 F.2d 691 (5th Cir. 1968) Moreover, it is doubtful that "incompetence" allegations constitute a major source of post-conviction litigation.

[27] *McCarthy* explicitly affirms "our holding that any noncompliance with Rule 11 is reversible error." 394 U.S. 464 at note 9, by noting that "prejudice inheres in a failure to comply with Rule 11 . . . . " *Id.* at 471.

[28] In *Boykin v. Alabama,* this Court decided an analogy to *McCarthy* for state courts, holding that, as a matter of constitutional requirement, a state guilty plea record must contain "an affirmative showing that [the plea] was intelligent and voluntary." 395 U.S. 238, 242. But, as here, the Court did not hold that such a record *forecloses* collateral attack. Instead, it observed that an adequate plea proceeding "*forestalls* the spin-off of collateral proceedings that seek to probe murky memories." (emphasis supplied) *Id.* at 244.

The *McCarthy* Court carefully refers to "the defendant's statement that he desired to plead guilty . . . [and his] statement that the plea was not induced by any threats or promises," as a "prima facie case for voluntariness." 394 U.S. at 469. But a "prima facie case" clearly is not a "conclusive" one in the terms of § 2255.

Such an acknowledgement does not mean, however, that a thorough inquiry into voluntariness at plea is of no utility in expediting any post-conviction disposition that may be necessary. Again, the *McCarthy* opinion speaks directly, but carefully, to the point:

> *To the extent that* the district judge thus exposes the defendant's state of mind on the record through personal interrogation, he not only facilitates his own determination of a guilty plea's voluntariness, but he also *facilitates that determination in any subsequent post-conviction proceeding based upon a claim that the plea was involuntary*. 394 U.S. at 467. (emphasis supplied)

Implicit in this "facilitation" language is a recognition that post-conviction determinations of voluntariness may not be avoidable altogether since allegations of facts dehors the record are always possible.[29] But the more thoroughgoing the inquiry at plea, the more expeditious post-conviction dispositions may be.[30] It may even be

[29] The same recognition is implicit in other language of the opinion: "By personally interrogating the defendant, not only will the judge be better able to ascertain the plea's voluntariness, but he will also develop a more complete record to support his determination in a subsequent post-conviction attack." 394 U.S. at 466.

[30] For example, it does not follow that because a defendant's statements at plea do not "conclusively" dispose of a later attack, they also have *no* weight in a subsequent proceeding. Moreover, subsequent allegations, read in the context of a full Rule 11 inquiry, may reduce the need for a full evidentiary hearing. Neither

that in some cases, subsequent allegations will be so unlikely or so narrowly disputed that they can be investigated and determined by affidavit, deposition, or without the presence of the movant. *Machibroda v. United States, supra* at 495.

The Rule 11 record in the case at bar serves by contrast to highlight the point. Although it might barely be said to disclose compliance with the minimum Rule 11 requirement, it also discloses a skimpy and disordered proceeding that is the antithesis of the *McCarthy* goal—where "reality, and not mere ritual, [is] controlling." 364 U.S. at 467-68, note 20.[31]

The ritual here is apparent from the outset. The defendant, unaided by counsel, appears in court having already signed waivers of counsel and indictment submitted to him by the prosecutor. (A 3) The court, without explaining the meaning of the right to indictment or confirming that the defendant understands the import of it, does no more than ascertain that the defendant has signed the grand jury waiver. (A. 4) The "waiver" of counsel is then treated with even less concern to assure that the defendant has intelligently considered its meaning and actually intends to proceed alone.[32]

Machibroda nor any other case deprives a §2255 court of "discretion" to shape a hearing in accord with the fact-finding needs arising from the particular dispute engendered by a §2255 motion. 368 U.S. at 495.

[31] Strictly speaking, this trial court did not fully explain the jurisdictional element of the federal bank robbery to the defendant. Accordingly, we do not concede full compliance with Rule 11.

[32] For the reasons presented at pp. 47-56 *infra*, this "waiver" should be held invalid and is thus by itself a ground for voiding the plea proceeding.

THE COURT: In addition you are entitled to be represented by an attorney and, if you are without funds with which to employ an attorney, the Court will appoint one for you. The Court has here before it a waiver of assignment of attorney. Is it your wish to proceed here without an attorney?

DEFENDANT FONTAINE: I guess so.

THE COURT: You have got to know so.

DEFENDANT FONTAINE: Yes, sir. (A. 4)

This so-called "waiver" is then left unreexamined in the face of the defendant's subsequent remark: "I don't know too much about the law because I have never been in Court before." (A. 5)

Upon that shaky foundation, the proceeding touches upon, but no more, each of the minimum *McCarthy* requirements. With respect to the consequences of the plea, the court recites the maximum penalty and asks: "You understand the maximum penalty?" "Yes, sir." (A. 4) But no explanation is given as to what a guilty plea is or what rights it waives. On the subject of voluntariness, three brief questions are put pertaining to promises, threats and "knowingly and freely and voluntarily offering your plea of guilty here." (A. 3,4) The defendant continues to produce appropriate denials and affirmations in monosyllables: "No, sir," "No, sir," "Yes, sir." The Court's inquiry as to the "nature of the charge" includes, at the request of the prosecutor, a cursory factual inquiry into the actual armed bank robbery.[33]

[33] This "inquiry" would also seem to establish "a factual basis for this plea." Rule 11, Fed.R.Crim.P. As noted, however, the Court did not explain or inquire into the federal element of the robbery offense. That typifies the carelessness of the plea proceeding.

(A. 5) Ironically, however, the proceeding winds down with the Court confused as to the nature of the charge and the names of the alleged perpetrators. (A. 6)

> THE COURT: He is charged with aiding and abetting Gregory Edward Lee.
>
> MR. ZANGLIN: No, I think Edward Gregory Lee abetted him.
>
> THE COURT: Aided and abetted by Edward Gregory Lee. That's the charge, do you understand that?
>
> DEFENDANT FONTAINE: Yes, sir.

The ritualistic nature of the process is perhaps most clearly manifest in the closing dialogue.

> THE COURT: Is it your wish that the Court accept your plea?
>
> DEFENDANT FONTAINE: Well, your Honor I wish you would accept my plea on the fact that I have never had a past record. I got strung up on the drugs and started to make some money.

Despite the indication contained in that answer that the defendant may understand his "plea" as a plea for mercy or leniency rather than a plea of guilty, the Court takes no steps to clarify his state of mind.

Nor is there any inquiry at that point as to whether the defendant is presently on drugs, in withdrawal, or otherwise in an impaired state of competence. The court of appeals below was thus utterly without a basis for its conclusion that the district court "determined . . . that he was not under the influence of drugs at the time. . . ." (A. 34) And its one-paragraph order affirming the summary denial below is no more than a shaky capstone set upon this flimsy process—a ritual piled upon ritual. But even if this formalistic appellate endorsement were fully

accurate, it is no better than the initial proceedings at obscuring the skimpiness of the inquiry undertaken. In light of that inquiry, it verges on the preposterous to conclude that such a record can be taken "conclusively" to rebut petitioner's subsequently detailed allegations.

By means of its required personal inquiries, Rule 11 guards the door against pleas entered by defendants who do not kr w that they need not plead, or who do not understand what they are pleading to or what can happen as a consequence. It also enables the trial court to reject a plea at the threshold when a defendant reflects doubt about his willingness or understanding. In some cases, a thorough inquiry at plea, sensitively tailored from case to case, *McCarthy, supra* at note 20, may provide a record adequate to dispose of a subsequent challenge or at least to "facilitate" disposition. But it utterly distorts the appropriate function of the Rule to suggest that by minimum adherence to a ritual it forever satisfies the important fact-finding tasks critical to the protection of constitutional rights.

Indeed, a ritual such as that performed in this case hardly deserves description as a fact-finding process. Even if it were one, however, it plainly did not develop any *facts* pertaining to the subsequent claim of coercion. It would thus renege upon the promise of the *Hayman* case, *supra*, to deny a hearing here in reliance on a ritual, but to require one in federal habeas where the "material facts were not adequately developed" at the prior hearing but at least some fact-finding hearing had been held. *Townsend v. Sain*, 372 U.S. 293, 313; *Kaufman v. United States*, 394 U.S. 217, 227.

Moreover, in *Sanders* this Court specifically permitted rehearing of a claim under §2255 that had previously been rejected on the merits if the prior hearing was not

full or the ends of justice would be served. 373 U.S. 15-17. Conclusive reliance upon a minimum Rule 11 proceeding where the claim was not even tendered is thus thoroughly inconsistent with *Sanders* and at war with *Hayman's* guarantee that §2255 is a remedy as broad as habeas corpus.

Thus even if this Court should find that the plea proceeding in this case satisfied Rule 11 and *McCarthy*, such a holding does not preclude a hearing on the voluntariness of the plea and the competence of the pleader under §2255.

IV. THE GUILTY PLEA WAS INVALID FOR WANT OF A VALID WAIVER OF COUNSEL ON THE FACE OF THE RECORD.

A. The Invalidity of the Waiver

"Since *Gideon v. Wainwright*, 372 U.S. 335 (1963), it has been clear that a guilty plea to a felony charge entered without counsel and without a waiver of counsel is invalid." *Brady v. United States*, 397 U.S. 742, 748-9 at note 6. Even prior to *Gideon*, however, this Court made clear that not every apparent "waiver" counts, where the right to counsel is at stake. The standard for a *valid* waiver of counsel was set forth in *Carnley v. Cochran*, 369 U.S. 506, 516:

> *The record must show* . . . that an accused was offered counsel but *intelligently* and *understandingly* rejected the offer. Anything less is not waiver. (emphasis supplied)

And as late as 1969 this Court reiterated the "requirement that the prosecution spread on the record," not merely the *rejection* of the right, but the "*prerequisites*

of a valid waiver. . . ."[34] *Boykin v. Alabama,* 395 U.S. 238, 242. (emphasis supplied)

Accordingly, an uncounseled guilty plea is valid only if the alleged waiver of counsel meets three criteria: (1) an accused must reject an offer of counsel; (2) he must do so "intelligently and understandingly"; and (3) the record must affirmatively establish these prerequisites.

This standard, requiring not mere rejection of an offer, but *record proof* of an "intelligent" and "understanding" rejection, derives from this Court's most honored "waiver" case, *Johnson v. Zerbst,* 304 U.S. 458, 464, which has set the benchmark from its decision in 1938 through an unbroken line of cases to the present.[35] *Johnson* announced the basic "waiver" definition—"an intentional relinquishment or abandonment of a known right or privilege," 304 U.S. at 464, but it also made luminous that even an intentional relinquishment is not a valid waiver unless the right to counsel was also abandoned "intelligently." 304 U.S. at 468.

To implement the requirement that a "waiver" be intelligent, as well as voluntary, *Johnson* imposed a duty

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[34] Although *Boykin* dealt with the waivers involved in a guilty plea, it expressly adopted the waiver of counsel rule in *Carnley* and held "that the same standard must be applied. . . ." 395 U.S. at 242.

[35] Some of the major cases in the line from *Johnson* include: *Walker v. Johnston, supra,* at 288 (1941); *Waley v. Johnston, supra,* at 104 (1942); *Hawk v. Olson,* 326 U.S. 271, 275 (1945) ("intelligent" waiver required); *Von Moltke v. Gillies,* 332 U.S. 708, 720 (1948) ("full understanding and comprehension"); *Moore v. Michigan,* 355 U.S. 155, 161 (1957) (mere rejection insufficient; "intelligently and understandingly"); *Miranda v. Arizona,* 384 U.S. 436, 475 (1966) ("knowingly and intelligently"); *Barker v. Wingo,* 407 U.S. 514, 525-26 (1972).

of searching inquiry upon a trial judge confronted with an apparent abandonment of the right to counsel. He must make a clear record determination of the waiver prerequisites:

> The determination of whether there has been *an intelligent waiver* of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused. . . . The constitutional right of an accused to be represented by Counsel invokes, of itself, the protection of a trial court, in which the accused . . . is without Counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an *intelligent and competent waiver* by the accused. While an accused may waive the right to Counsel, whether there is a *proper waiver* should be clearly determined by the trial court . . . " *Id.* at 464-65. (emphasis supplied)

In years subsequent, the Justices of this Court have relentlessly pursued the *Johnson* standards. Mr. Justice Frankfurter put the *Johnson* requirement of an "intelligent" waiver, this way:

> the Constitution does not force a lawyer upon a defendant. He may waive his Constitutional right to assistance of counsel *if he knows what he is doing and his choice is made with eyes open.* (emphasis supplied) *Adams v. McCann,* 317 U.S. 269, 279.

And Mr. Justice Black described the nature of a trial judge's duty to ensure that a defendant's eyes *are* open:

> To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case

> before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defense to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. *A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination* of all the circumstances under which such a plea is tendered. *Von Moltke v. Gillies,* 332 U.S. 708, 723-74.[36]

Only after such a "penetrating and comprehensive" inquiry can the record confirm the prerequisites of a valid waiver.

In guilty plea cases, the waiver of counsel has traditionally been regarded by this Court with special solicitude. See *e.g., Brady v. United States, supra* at note 6. For in those cases, the requirement of an "intelligent" relinquishment of counsel critically implements the standard that the plea itself is valid only "if both 'voluntary' and 'intelligent.' " *Brady, supra* at 747. The plea constitutes "a waiver of the fundamental rights to a jury trial, *Duncan v. Louisiana,* 391 U.S. 145, to confront

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[36] Although Mr. Justice Black spoke for a plurality of four in *Von Moltke,* the entire Court, indeed the Government as well, confirmed that even a "written and otherwise clearly stated waiver of counsel" is invalid if not "freely, intelligently, and knowingly made." 332 U.S. at 731-32 (Burton, J. dissenting). And the case persists as a leading "waiver" precedent in this Court. See *e.g., Brady v. United States,* 397 U.S. 742, 748 at note 6.

one's accusers, *Pointer v. Texas,* 380 U.S. 400, to present witnesses in one's defense, *Washington v. Texas,* 388 U.S. 14, to remain silent, *Malloy v. Hogan,* 378 U.S. 1 and to be convicted of proof beyond all reasonable doubt, *In re Winship,* 397 U.S. 358." *Santobello v. New York,* 404 U.S. 257, 264 (Douglas, J. concurring). But the waiver of counsel might justly be described as the "domino" waiver from which all others readily flow. This Court has all but so described it in acknowledging that "an intelligent assessment of the relative advantages of pleading guilty is frequently impossible without the assistance of an attorney. . . ." *Brady v. United States, supra* at note 6.

The critical role of counsel in ensuring that a plea is "intelligent", as well as voluntary, invokes a heightened duty of trial court inquiry when an apparent waiver of counsel is tendered. In such cases, it should be imperative that trial courts follow the *Von Moltke* directive to "make certain that an accused's professed waiver of counsel is understandingly and wisely made . . . [by] a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered." 332 U.S. at 724.

Leading cases in the courts of appeals have acknowledged, however, that "federal courts have looked to the substance of the *Von Moltke* formulations, and not to its formulas." See *e.g., Spanbauer v. Burke,* 374 F.2d 67, 72 (7th Cir. 1966); *United States v. Warner,* 428 F.2d 730, 734 (8th Cir. 1970). This Court is respectfully referred to the *Spanbauer* case, still regarded as containing "perhaps the most exhaustive study of the law of waiver of counsel as applied in the various circuits. . . ." *Warner, supra* at 734. That study discloses widespread departures from the particular inquiries Mr. Justice Black's "formulas" demanded. But no court of appeals, except the one

below, has abandoned the underlying requirement that a trial court accept a waiver only "after a determination reflecting that under the particular facts and circumstances of the case, including the background, experience and conduct of the accused, the waiver was made by the accused intelligently and understandingly. . . ." *Spanbauer, supra* at 74.

At the very least, even appellate courts softening the *Von Moltke* formulas have demanded "positive and unequivocal answers" from the defendant, repeated judicial advice "of the desirability of his being represented by an attorney," and meticulous emphasis upon the seriousness of the offense beyond a mere statement of the maximum penalty. See *e.g., United States ex rel Miner v. Erickson,* 428 F.2d 623, 627 (8th Cir. 1970) (Blackmun, J.). For comparative purposes, the guilty plea and waiver of counsel proceedings in the *Miner* case are reproduced in the Appendix to this Brief.

Whether or not minimal requirements such as these satisfy this Court's waiver standards, they condemn by contrast the perfunctory and formalistic inquiry conducted by the trial court in this case. Whatever standard this Court ultimately adopts, it should banish as beneath it any suggestion that a valid waiver of counsel appears upon the record here.

The trial court in this case was confronted with a defendant who had already signed in-custody waivers of counsel and indictment. Nonetheless, the court made no effort whatever to inform the defendant of the importance of the right to counsel, to explain what a guilty plea entails, or to suggest that counsel can be helpful or desirable in connection with a plea. *Contrast, United States ex rel Miner v. Erickson, supra* at 627-28. Neither

did the court inform the accused that the waiver he had signed earlier was not binding upon him and could be reconsidered now. This omission was particularly important, for the court's questioning as to counsel followed immediately upon the subject of the written "waiver" of indictment. And as to that "waiver," the court did little more than ascertain that the defendant had signed it. That form of indictment inquiry is bound to leave a spill-over impression that a prior written waiver is binding as to counsel as well. Surely it defies common sense to ignore that, unless advised otherwise, a layman will commonly regard his signature as tying him down.

To be sure, the court then inquired whether the defendant wanted a lawyer. But that colloquy only demonstrates the sterility of the proceeding as a whole. After formally reciting the defendant's right to counsel, the court made references to the written waiver "here before it" and asked whether the accused wished "to proceed here without an attorney." The defendant replied, "I guess so." Although an occasion was thus provided to underscore defendant's freedom to change his mind, the court did no such thing. *Cf. Miner, supra* at 628. Instead it spoke in terms, with a mandatory overtone, that could only *encourage* relinquishment of counsel. "You have got to know so." And the defendant replied ambiguously: "Yes, sir." This reply was not an adequate expression of intent to relinquish counsel, for the defendant's response appears to acknowledge only that he may not "guess" about the waiver. It does not affirm his intent to make it.

Read charitably, however, the "Yes, sir" answer *might* reflect an intent to proceed unaided, particularly if the listener desired that result. But when *any* ambiguity is present, it is little to ask that a trial court confirm the defendant's intent in "positive and unequivocal" terms. *Cf. Miner, supra* at 627.

Moreover, any court sensitive to the "substance," even if not the "formulas" of *Johnson* or *Von Moltke*, would surely refrain from encouraging a waiver tendered with such ambiguity. It is the obligation of a court in such circumstances to explain to a layman that he should not "guess" whether to waive counsel, and should recognize that a lawyer is not only useful *at trial*, but often important as well to "an intelligent assessment of the relative advantages of pleading guilty." *Brady, supra* at note 6.

At the very least, it is incumbent upon a trial court to avoid giving any possible impression that, *in order to* plead guilty, "you have got to know" that you wish to proceed without counsel. Laymen are all too likely to assume that a lawyer is useful only at trial and thus to interpret an offer of counsel at plea as just another way of asking whether an accused intends to plead or to go to trial with a lawyer.[37]

When doubt appeared in this proceeding, however, the trial court did not even do so much as reiterate an offer of counsel. *Cf. Miner, supra* at 627-29. Neither did it do so after the defendant remarked, moments later: "I don't know too much about the law because I have never been in Court before." Such an observation by an accused calls for renewal of the offer of counsel, *Cf. Miner, supra* at 627-31, if not, indeed, some inquiry into "the background, experience and conduct of the accused," *Johnson, supra* at 464-65; *Spanbauer, supra* at 74. But throughout this proceeding, the trial court made only one

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[37] Studies confirm the incidence of such confusion. Remington, *Defense of the Indigent in Wisconsin*, 37 Wis. B. Bull 40 (1964); Elison, *Assigned Counsel in Montana*, 26 Mont. L. Rev. 1 (1965); Newman, *Conviction*, p. 204 (Am. Bar F. 1966).

ritualistic offer of counsel, and never even began to explore the nature of the particular defendant who had apparently rejected it or why he would choose to do so.[38] Indeed, even after the defendant alerted the court to his use of drugs, there was no inquiry as to their possible impact upon him at plea.

Established doctrine that "courts indulge every reasonable presumption against waiver," *Johnson v. Zerbst, supra* at 464; *Barker v. Wingo,* 407 U.S. at 525 counsels rejection of this alleged waiver as ambiguous. It does not even unequivocally satisfy the first waiver criterion, *supra.* Even if the record be read, however, to reflect a rejection of counsel, it would trivialize the meaning of an "intelligent" waiver to find one affirmatively established on this record. Cases in the courts of appeals already reflect erosion of that Sixth Amendment requirement. This case reflects utter disregard for it. It is time to put a stop to that trend. This Court should strike this bare-boned plea as invalid and remand to the district court with instructions to vacate sentence and to permit petitioner to plead anew.[39]

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[38] It is thus particularly ironic, as well as insupportable, that the trial court's opinion concludes: "Each time the court offered petitioner the assistance of counsel prior to acceptance of his plea, such offer was declined." (A. 30) There was only one such offer. No solace derives from the petitioner's second "waiver" of counsel *at sentencing.* (A. 8) The "waiver" inquiry at that point was even more limited than at plea. Moreover, the principal functions of counsel had already been bypassed by the prior waiver. Since the "cat was already out of the bag," it adds nothing that petitioner acquiesced in a second formality.

[39] The §2255 motion asserts that the waiver was invalid for want of understanding the "consequences." (A. 11) The trial court rejected that contention. (A. 30) The court of appeals ignored it, as it did the requirement that a valid plea must be both "voluntary" and "intelligent". It affirmed upon the simple finding that the plea was voluntary. (A. 34)

B. Should Any Waiver Be Permitted?

Few would disagree that the guilty plea is "perhaps the most devasting waiver possible under our Constitution." *Dukes v. Warden*, 406 U.S. 250, 257 (Stewart, J. concurring). It is no less obvious that "an intelligent assessment of the relativ advantages of pleading guilty is frequently impossible without the assistance of an attorney. . . ." *Brady, supra* at note 7. Yet, roughly one of every five federal defendants pleading guilty does so after waiving counsel.[40]

This case affords this Court an opportunity, under its supervisory power, to enhance the reliability of the guilty plea by precluding the uncounseled plea altogether, or at least requiring that no waiver of counsel be accepted unless the pleading defendant has at least once considered the waiver with counsel.

Several States have already adopted substantially similar protections.[41] Some courts have adopted such rules as

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[40] This conclusion is derived from statistics generously compiled at the request of counsel by the Administrative Office of the United States Courts. The statistics relied upon encompass both guilty and *nolo contendere* pleas during the fiscal years 1969-1972 in 89 United States District Courts, exclusive of the District of Columbia and the territories. The breakdown is as follows:

Fiscal	Total Pleas	Pleas with Waivers
1969	23,138	4,532
1970	24,111	4,347
1971	27,544	4,679
1972	29,751	5,835
	104,544	19,393

[41] See *e.g.* Ala. Code, Title 15 §§260, 262 (1958) (felony cases); Cal. Pen. Code §§1108 ("life" or "death" cases); Tex. Code Crim. P. §1.13 (felony); Va. Code §19.1-19.2 (1960) (felony).

a matter of practice.[42] And the modified no-waiver rule, requiring at least prior consultation with defense counsel, has been adopted as a minimum standard by the American Bar Association. *Standards Relating to Providing Defense Services*, §7.3, p. 65 (Approved Draft 1968).

This Court has apparently rejected the contention that the Constitution requires such a rule. *Adams v. McCann*, 317 U.S. 269, 277-80.[43] But the supervisory power is appropriately used where the probability of injustice is high absent the rule imposed, see *Brady*, *supra* at note 6, and the cost of the rule is relatively low.[44]

Any analysis of cost should consider the decreased systemic costs deriving from the extent to which the presence of counsel at plea will deter, or facilitate disposition of, subsequent collateral attacks. Although the popular conception is false that the tide of collateral attack is ever-rising, this Court has acknowledged "the great waste of judicial resources required to process the

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[42] See Newman, *Conviction*, p. 51 (Am. Bar F. 1966); *Accepting the Indigent Defendant's Waiver of Counsel and Plea of Guilty*, 22 U. Fla. L. Rev. 455, 467; Kamisar & Choper, *The Right to Counsel in Minnesota*, 48 Minn. L. Rev. 1, 34-35.

[43] At least one court, however, in the course of a thorough analysis of a related question, has read the language in *Adams* as *dictum*. *United States v. Dougherty*, (D.C. Cir. June 30, 1972, pp. 13-14 (slip opinion)).

[44] Although economic considerations are but one element of "cost," they are relevant. Unfortunately no figures are available to show how many defendants who waived counsel in 1969-72 would have been eligible for appointment of counsel if waivers had been precluded. As of 1969, however, 42% of federal defendants required assigned counsel. Federal Offenders in the United States District Courts, p. 6 (Admin. Office 1969).

frivolous attacks on guilty plea convictions," when the plea proceeding is inadequate.[45] *McCarthy, supra* at 472. The focus upon the counseled plea in the guilty plea trilogy is a further acknowledgement of the role of counsel in diminishing post-conviction challenges. A requirement that all pleas be counseled would be an even more solid affirmative step in securing the adequacy of the plea proceeding. It may be that, with such a rule, accompanied by expanded plea inquiries and evolving standards of adequate counsel, the criminal justice system can fairly develop a guilty plea that will appropriately constitute a waiver of all litigation, direct and collateral.[46]

Even without such a goal, however, no system should tolerate the degree of unfairness it already acknowledges as inherent in the uncounseled plea. This is particularly true for the federal system where the question of "guilt" may often turn upon a technical jurisdictional element or a complex scheme of regulation. But it is true in any

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[45] Statistics contained in his report confirm the observation of the Director of the Administrative Office that the volume of prisoner petitions in the federal courts "has apparently stabilized." *Annual Report of the Director*, p. 132 (Adm. Office 1971). See also *Annual Report of the Director*, II-28 (Adm. Office 1972).

[46] There is a Proposed Amendment to Rule 11, 52 F.R.D. 415. No suggestion is intended here that it would be enough. The problem is to arrive at a plea proceeding at which the waiver of the right to contest is fully intelligent. The details of such a proceeding are beyond the scope of this case, except that the required presence of counsel is clearly a first step.

It may also be that no system can be devised that can fairly eliminate subsequent attacks based upon "incompetence" to waive at plea. But that caveat does not diminish the utility of a system which would at least reduce the availability of interminable litigation.

system where the coercive pressures of custody, such as those alleged here, can operate. This Court has traditionally looked to the lawyer to "break . . . the stream" of coercive events. *Compare Darwin v. Connecticut*, 391 U.S. 346, 349 with *Parker v. North Carolina*, 397 U.S. at 796; or to attenuate the effect of coercion prior to plea. *Parker v. North Carolina, supra* at 796. In the interest of justice, it should see to it now that no federal defendant pleads guilty without one.[47]

Since petitioner Fontaine was unrepresented throughout, this Court should reverse and remand with instructions to grant the motion he filed under 28 U.S.C. §2255.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed with instructions to the district court to vacate sentence.

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[47] The existence of 28 U.S.C. §1654 guaranteeing the right of parties to "plead and conduct their own case personally" may refer only to contested cases. If not, that statute still might not preclude the appointment of *amicus curiae* to consult with a defendant who expresses a wish to waive counsel.

Although the matter is not free from doubt, it seems tenuous that there is any constitutional right to plead guilty *pro se*. See *People v. Sharp*, (Calif. Supreme Court, July 7, 1972); see also, *State v. Thomlinson*, 100 N.W.2d 121 (S.D. 1960) (pre-waiver compulsory counsel does not violate state *pro se* constitutional right).

Alternatively, that court should be instructed to grant petitioner a full evidentiary hearing upon all of the allegations advanced in his §2255 motion.

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APPENDIX

The transcript of the waiver of counsel and plea of guilty in *United States ex rel Miner v. Erickson*, 428 F.2d 623, 628-31 (8th Cir. 1970):

BY THE COURT:

Q. Is that your true name–Nelson Miner? A. Yes, sir.

Q. What is your age? A. Forty.

Q. Do you have an attorney? A. No, sir.

Q. Now, this is a serious criminal offense and is punishable by imprisonment in the South Dakota State penitentiary for not more than 20 years which makes it a very serious criminal offense and the Court believes that in such a case a man should be represented by an attorney. You know of course that you are entitled to be represented, if you so desire. You know that? A. Yes.

Q. And that in any criminal action in circuit court where it is shown that the defendant is without means and unable to employ counsel the court shall assign counsel for his defense whose duty it shall be to appear for and defend the accused upon the charge against him and counsel so assigned shall be paid by the county. Now, you understand that you are entitled to be represented by an attorney? A. Yes, sir.

Q. And, if you were without means and funds to hire one you would still be entitled to an attorney and that the court would appoint one for you. Do you understand that? A. Yes.

Q. Do you want an attorney? A. No, sir.

Q. What? I didn't hear your answer? A. No, sir.

Q. You understand it is a serious offense do you? A. I do uh-huh.

Q. By that do you mean yes? A. Yes, sir.

Q. How much education have you had? A. Sixth grade is all.

Q. Sixth grade. Do you understand what I am discussing with you here in court? A. Yes, sir.

Q. And you know this is a serious offense? A. Yes, sir.

Q. And you wish—you want the court to understand that you do not want an attorney. Is that right? A. That is right.

Q. You understand that the court has recommended to you that you do have an attorney. You do understand that? A. Yes, sir.

Q. Very well. I understand that the states attorney has filed an information charging you with indecent molestation of children. Do you understand what that is? A. Yes, sir, I do.

Q. And as I have told you you can be imprisoned up to 20 years in the penitentiary for that offense. Do you understand that? A. Yes, I understand.

Q. And it is a felony. It is a serious offense. Now, in addition to this right to be represented by an attorney you also have a right to appear in court and defend yourself. Now, I want to ask you if you understand that you have that right? A. Yes, sir.

Q. You also have the right to demand the nature of the charge or accusation against you and to have a copy of it. Do you understand that you have that right? A. Yes, sir.

Q. You understand too that every person is presumed to be innocent of the charge against them unless they either admit their guilt or are proven to be guilty. Do you understand that? A. Yes, sir.

Q. You also have the right to meet the witnesses against you face to face in open court to see and to hear them testify. Do you understand that you have that right? A. Yes, sir.

Q. You also have the right to have compulsry [sic] process of the law served for obtaining witnesses in your own behalf. Do you understand that you have that right? A. Yes.

Q. And the right to a speedy and a public trial by an impartial jury of the county in which the offense is alleged to have been committed in this case Dewey County, South Dakota. That means that you are brought to trial speedily at the next term of the court and that you have an impartial trial. That means a fair trial. Do you understand that you have a right to that? A. Yes, sir.

Q. Now, is there anything about your being brought here or coming before the judge today that you don't understand? A. No, sir.

Q. You understand that you are here because they charge you have committed a serious felony? A. Yes, sir.

Q. Now, do you want a trial? That means to determine whether or not you are guilty or not guilty or innocent? A. No, sir.

Q. You do not want a trial? A. No, sir.

Q. You know that you can have one and that [you] are entitled to it? A. Yes, sir.

Q. Now, that is not regular time for the trial of cases in this county. That is in May. Now, did you ask to be brought here before the judge today? A. Yes, sir.

Q. Was it your idea to come here? A. I want to get the sentence over with.

Q. You want to get it over with? A. Yes, sir.

Q. And is that why you are here today? A. Yes, sir.

Q. Did you decide that yourself? A. Yes.

Q. No one tried to talk you into that? A. No, sir.

Q. And you understand that if you would enter a plea of guilty all this court would have left to do would be to sentence you. Do you understand that? A. Yes.

Q. Now, are there any facts that you think a lawyer could present for you that would help your case in any way? A. No, sir, I don't think so.

Q. You don't think so? A. No.

Q. Are you appearing here today of your own free will? A. Yes, it is my free will.

Q. Are you ready at this time to enter a plea to the information? A. Yes, sir.

Q. Mr. Aberle:

MR. ABERLE:

Here Mr. Nelson is a copy of the information which I have filed against you and which I will read at this time.

(The information was read aloud and in full at this time)

Q. Nelson Miner, I will ask you if you understand what has been going on here in court? A. Yes, sir, I understand.

Q. I will again ask you, if you would like to consult with an attorney about this matter? A. No, sir.

Q. Now, Nelson Miner, you have heard the states attorney, Mr. Aberle, read the information charging you with the crime of indecent molestation of minor children under the age of 15 years and the names are Colleen Marie LaPlant of the age of six years and Rita Nadine LaPlant of the age of four years. Now, do you understand what you are charged with? A. Yes, sir.

Q. Now, before I ask you what your plea will be I must impress upon you that any plea that you make must be voluntary and it must be of your own free will. Do you understand that? A. Yes, sir.

Q. Are you ready to enter your plea? A. Yes, sir.

Q. Very well then what is your plea to this information charging you with indecent molestation of—that is, committing lewd and lascivious acts, deeds, signs and performances and conduct upon the persons of Colleen

Marie LaPlant of the age of six years and Rita Nadine LaPlant of the age of four years—in other words, that you did commit the crime of indecent molestation of children. Now, what is your plea—guilty or not guilty. A. Guilty.

Q. Let the plea of guilty be entered. The defendant stands convicted in this court of the offense of indecent molestation of minor children. Now, I want to ask you if you know of any legal reason why sentence should not be pronounced upon you? A. No, sir.

Q. Is that—is there any fact or facts about you that you think the court should know about? A. I don't believe so.

Q. Every defendant upon conviction for a felony is entitled to 24 to 48 hours or longer on good cause shown between the time of conviction and sentence. Do you understand that you have that right between the time of conviction and sentence? Do you understand that? A. Yes, sir.

Q. Do you wish to have the sentencing done at a later time or would you rather that the court would do it today? A. I would rather have it done today.

Q. You understand that you would then have to waive this right to time between conviction and sentence, do you? Do you understand that? A. Yes, sir.

Q. Now, is there any fact or facts surrounding either yourself or the commission of this offense that you wish to present to the court? A. No, sir.

Q. Is that anything that you want to tell me? A. No, sir.

* * * * *

Q. To your knowledge is there anything wrong with your with you? A. The only thing is when I am drinking.

Q. Do you think there is anything wrong with your mind? A. No, just drink.

Q. In other words that you don't know what you are doing when you are drinking, is that what you mean? A. Yes.

Q. Did you know these children? A. Yes.

Q. Did they live close to where you were living? A. I was staying with them at the time.

Q. With these LaPlants? A. Yes.

Q. Were their parents and you living in the same house? A. Yes, sir.

Q. Have you ever been in trouble before? A. Yes.

Q. What kind of trouble? A. I was up here before you once before three or four years ago.

Q. What was that for? A. Grand larceny.

Q. Did you serve any time in the penitentiary? A. No, you gave me a two year suspended sentence.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-6757

DAVID X. FONTAINE, PETITIONER

v.

UNITED STATES OF AMERICA

N WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court (A. 30-31) is not eported. The court of appeals wrote no opinion. Its rder affirming the district court (A. 34) is not eported.

JURISDICTION

The judgment of the court of appeals was entered n April 21, 1972 (A. 2). The petition for a writ of ertiorari was filed on June 1, 1972, and was granted n November 6, 1972 (A. 35). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner is entitled to a hearing on his self-serving and uncorroborated allegations in a motion to vacate his sentence under 28 U.S.C. 2255 that he was coerced into pleading guilty, where he personally represented to the court at arraignment that his plea was not coerced and where neither the motion nor the records in the case reveal any objective facts explaining why petitioner could not have been expected to reveal the alleged coercion at the arraignment.

2. Whether, if petitioner's allegations of coercion are not barred by his responses at the arraignment, a hearing was nevertheless properly denied on the ground that his motion and the records in the case conclusively show that he is entitled to no relief.

3. Whether the conclusory assertions in the motion that petitioner lacked the mental competence to plead guilty required a hearing.

4. Whether petitioner validly waived his right to counsel; if so, whether his guilty plea was invalid because it was entered after the waiver of counsel.

STATUTE AND RULE INVOLVED

28 U.S.C. 2255 provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, * * * or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> * * * * *

> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.* * *

Rule 11, Fed. R. Crim. P., as amended February 28. 1966 (effective July 1, 1966), provides in pertinent part:

> * * * The court may refuse to accept a plea of guilty, and shall not accept such plea * * * without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. * * * The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

STATEMENT

In November 1969, petitioner pleaded guilty in the United States District Court for the Eastern District of Michigan to a one-count information charging him with the armed robbery of a federally insured bank in violation of 18 U.S.C. 2113(d). He was sentenced to 20 years' imprisonment, subject to the parole eligibility provisions of 18 U.S.C. 4208(a)(2) (A. 8). In August 1971, petitioner filed *pro se* a motion under 28 U.S.C. 2255 to vacate his conviction and sentence on the ground that his plea had not been voluntarily and competently entered (A. 1, 9–15). The district court denied the motion without holding an evidentiary hearing (A. 30–31) and the court of appeals affirmed (A. 34). The files and record in the case, on

which the district court relied in denying the motion summarily, show the following facts:

A. THE ARRAIGNMENT PROCEEDINGS

On November 13, 1969, petitioner, then 26 years old, appeared before District Judge Fred W. Kaess for arraignment on the information (A. 3, 16). An Assistant United States Attorney told the court that petitioner had been given a copy of the information, had been advised of his rights to counsel and to grand jury indictment, had signed waivers of both rights, and had indicated that he intended to plead guilty to the information (A. 3). The court explained to petitioner his rights to indictment and to counsel; petitioner confirmed that he was waiving both rights.[1]

[1] The colloquy between the court and petitioner with respect to the waiver of rights was as follows (A. 4):

"The COURT. The first thing of consequence is that you have signed also a waiver of Grand Jury indictment which means you are entitled to have this matter first submitted to a Grand Jury and a determination made by that body and an indictment returned first; do you understand that and the rights you have thereunder? Anyway, that's what you will get if you wanted it to go to the Grand Jury.

Defendant FONTAINE. Yes.

The COURT. You have signed a waiver of that right, am I right?

Defendant FONTAINE. Yes, sir.

The COURT. In addition, you are entitled to be represented by an attorney and, if you are without funds with which to employ an attorney, the Court will appoint one for you. The Court has here before it a waiver of assignment of an attorney. Is it your wish to proceed here without an attorney?

Defendant FONTAINE. I guess so.

The COURT. You have got to know so.

Defendant FONTAINE. Yes, sir."

The court then questioned petitioner personally to determine whether he understood that he was charged with armed bank robbery, whether he realized he was subject to a possible maximum penalty of 25 years in prison and a $10,000 fine, whether anyone had made any promise of any kind with respect to his proposed guilty plea or had threatened him, and whether he was "knowingly and freely and voluntarily" offering his plea of guilty. Petitioner acknowledged that he understood the charge and maximum penalties, stated that no threats or promises had been made, and assured the court that the was entering his plea voluntarily (A. 4–5). Petitioner specifically admitted that on October 8, 1969, he had held up at gunpoint the teller of the Liberty State Bank in Hamtramck, Michigan, had taken over $1,400, and had been aided and abetted in the robbery by one Edward Gregory Lee (A. 5–6). Petitioner thereupon asked the court to accept his plea since he "never had a past record"[2] and since he "got strung up on drugs and * * * started to make some money" (A. 6). The court accepted the plea and ordered the preparation of a presentence report (*ibid.*).

B. THE SENTENCING PROCEEDINGS

Three months later, on February 13, 1970, petitioner again appeared before Judge Kaess, this time for sentencing (A. 7–8). The court noted that petitioner had

[2] In this Court, petitioner acknowledges that his denial of a past record at the guilty plea hearing was incorrect and that in fact he has a lengthy police record, including several convictions (Pet. 11; Reply to Memorandum in Opposition, p. 4).

waived his right to counsel at the time of his plea and asked him whether he wished to proceed without counsel during sentencing as well. Petitioner said he did. Before the court imposed sentence, petitioner asked for mercy on the ground that he had been "under the influence of drugs when this happened." He further represented to the court that since he had been in jail for five months, he believed he had kicked the habit (A. 8).

C. THE SECTION 2255 PROCEEDINGS

1. THE MOTION TO VACATE

On August 6, 1971, almost 21 months after pleading guilty, petitioner filed a *pro se* motion in the district court under 28 U.S.C. 2255, seeking to vacate and set aside his judgment of conviction and sentence (A. 1, 9–15).[3] Petitioner alleged in the motion that on the night of October 21, 1969 (some two weeks after the bank robbery and 23 days prior to the entry of his guilty plea), police officers broke into his home without a search warrant or probable cause, frightened his wife and children, knocked him momentarily unconscious, dragged him in his underwear from his home, and took him to the police station. At the police station, petitioner continued in his allegations, he was handcuffed to a chair and questioned about several crimes; petitioner alleged that an officer named John Crookshank struck him with fists and open hands, called him a "nigger bastard," and promised to beat

[3] The motion was sworn to by petitioner on July 20, 1971 (A. 12).

him to death if he did not cooperate. Petitioner further alleged that "while befuddled, groggy, and in mortal fear of his life [he] informed the police that he would say anything they wanted him to say" (A. 9–10).

Petitioner also alleged in his motion that the "brutal treatment" by the police officers opened a gunshot wound he had received a few days prior to his arrest and caused the wound to bleed freely. Petitioner asserted that, after blacking out a couple of times and while in severe pain, he was refused a doctor or a lawyer and was told that his head would be bashed in if he did not cooperate. Petitioner asserted that, while allegedly in fear of his life, he agreed to cooperate, admitted committing various crimes the police told him he had committed, and signed several papers. He thereupon allegedly lost consciousness and awoke while being admitted to the Detroit General Hospital (A. 10).[4]

Petitioner further alleged in his motion that state and federal officers interrogated him in the hospital while he was "ill and mentally disturbed," and coerced him into pleading guilty to armed bank robbery in the federal court by threatening that otherwise he would be prosecuted in the state court and sentenced to life

[4] Petitioner alleged that the hospital records reflect that he was admitted suffering from "Heroin addiction, serum hepatitis, gunshot wound in right abdomen, hematoma of the right flank and a convulsive disorder" (A. 10). In fact, petitioner failed to distinguish between the hospital records relating to his admission on the day of his arrest and the records relating to a separate admission almost two months later (see pp. 9–10), *infra*).

imprisonment. The officers allegedly told petitioner the details of the bank robbery—a crime petitioner alleged he had no knowledge of committing (A. 10–11).

Finally, petitioner alleged that he had a severe mental problem, suffered from epilepsy, and had a "mental trauma of major proportions" due to having been shot in the head by the police when a teenager. His fear of the police was allegedly so strong that he lived with the constant belief that they would kill him if he did not obey their every whim. It was this traumatic condition that had led him to agree to plead guilty to a bank robbery he allegedly had not committed. Petitioner alleged that the police had so conditioned his mind for the guilty plea hearing that he did not understand the consequences of his guilty plea or of his waivers of his rights to counsel and to be proceeded against by way of indictment. He also claimed that, because he only had a seventh grade education, he did not understand the legal terms used by the court. Petitioner concluded his motion by asserting that he was mentally ill at the time of his arraignment and that his guilty plea was a product of that illness (A. 11–12).

2. THE HOSPITAL RECORDS

Petitioner attached as exhibits to his motion two discharge summaries prepared by physicians relating to separate periods during which petitioner was hospitalized in the Detroit General Hospital—the first covering the period October 21–26, 1969 (beginning the day of his arrest) and the second covering the pe-

riod from December 17, 1969, to January 6, 1970 (beginning two months after the date of the arrest and more than a month after petitioner's guilty plea) (A. 16–20).[5] Petitioner also attached to his motion a letter from a hospital in Florida relating to a two week period of hospitalization in 1962 for treatment of a gunshot wound in the head (A. 21).

The October 21–26 period of hospitalization. The discharge summary for petitioner's first period of hospitalization listed petitioner's ailments as follows: "Final Diagnosis: Hematoma, right lumbar region abdominal wall. Secondary Diagnosis: Two-week-old gunshot wound, abdominal wall" (A. 19). The summary stated that petitioner had been admitted with a history of pain and superficial swelling in the abdominal wall as a result of having been shot in the abdomen two weeks before. A physical examination of petitioner had revealed "very superficial swelling in the abdominal wall" and that the rest of petitioner's system was "absolutely normal." The summary concluded by noting that petitioner was being discharged in good condition, to be treated further in the Clinic (A. 19–20).

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[5] Because only the second of the discharge summaries was included by petitioner in the appendix to the petition for a writ of certiorari and that summary makes no reference to the first admission, we were unaware of the first admission when we filed our Memorandum in Opposition to certiorari and mistakenly stated therein that the hospital records showed that petitioner was not admitted to the hospital until December 17, 1969 (p. 2, n. 2). Petitioner clarified the matter in his Reply Memorandum (p. 2).

The December 17 to January 6 period of hospitalization. The discharge summary for this period of hospitalization listed petitioner's ailments, as finally diagnosed, as heroin addiction, serum hepatitis, old gunshot wound in the abdomen and convulsive disorder (A. 16). The summary stated that petitioner had been a known heroin addict for two years, had been in jail without access to heroin for approximately one and one-half months prior to his admission, and was admitted complaining of dark urine, vomiting and other serious discomforts which had begun approximately one week before.[6] The report also mentioned petitioner's continued complaints concerning the abdominal gunshot wound he had received two weeks prior to his arrest and referred to a previous gunshot wound he had received in the head in 1962. Petitioner reportedly had suffered from persistent headaches and "episodes of seizures" since the 1962 shooting (A. 16–17). The discharge summary indicated that petitioner had improved steadily while in the hospital after treatment for a urinary tract infection, that a neurological examination showed no neurological deficit, and that he had been discharged in satisfactory condition (A. 17–18).

The 1962 Florida hospital record. The letter from the Florida hospital discloses that petitioner[7] was

[6] In other words, the deterioration of petitioner's condition which led to his second period of hospitalization became manifest about December 10, 1969, or nearly four weeks after he had pleaded guilty to armed bank robbery.

[7] The letter refers to "Hubert Fountain, Jr.," apparently an alias used by petitioner.

admitted to the hospital in 1962, when he was about 19 years old, after being shot by the police while trying to avoid arrest. The letter reports that surgery was necessary to remove a bullet which had entered the head at the floor of the mouth and had lodged in the frontal sinus. Petitioner was "discharged as improved, with a prognosis of good" (A. 21).

3. THE DECISIONS BELOW

With the foregoing facts before it, the district court denied petitioner's motion without a hearing, holding that "[a] review of the entire record * * * fails to substantiate [petitioner's] claims" (A. 30). The court noted that the record showed that petitioner had declined the assistance of counsel prior to the acceptance of his guilty plea and that he had been questioned on the voluntariness of his plea in full compliance with Rule 11 of the Federal Rules of Criminal Procedure (A. 30–31). The court held that under these circumstances, petitioner "cannot now be heard to collaterally attack the record and deny what was said in open court" (A. 31).

On appeal, the Sixth Circuit affirmed on the ground that the district court had fully complied with Rule 11 at the guilty plea hearing (A. 34).

SUMMARY OF ARGUMENT

A

1. Petitioner's motion under 28 U.S.C. 2255 attacks the validity of his guilty plea on the ground that it was coerced. Under Section 2255, he was entitled to a hear-

ing on the allegations in his motion, "[u]nless the motion and the files and records of the case conclusively show that [he] is entitled to no relief." It is our position that where, as here, a guilty plea hearing is conducted in compliance with Rule 11 of the Federal Rules of Criminal Procedure and a defendant expressly represents in open court that his guilty plea is not the result of threats, promises, or coercion, the defendant may not ordinarily repudiate that representation through uncorroborated allegations in a Section 2255 motion that his plea was not in fact voluntary. In such situations, we submit, the motion and record "conclusively show," within the meaning of Section 2255, that the defendant is entitled to no relief.

We acknowledge that under some circumstances a defendant's representations of voluntariness at the time he pleads guilty should not be binding. If the defendant was mentally incompetent at the time of his plea or if he was specifically warned by the prosecutor not to disclose a promise of leniency to the court, he should not be foreclosed from challenging his plea in a later Section 2255 motion. But where it does not appear from allegations of objective facts in a motion to vacate or from the records in a case that the defendant could not reasonably have been expected to disclose alleged promises or threats at his guilty plea hearing, his responses at that hearing should be binding.

2. Neither petitioner's motion nor the records in this case allege or disclose objective facts explaining why he could not have been expected to disclose at the plea

hearing any alleged threats and coercion of the police some three weeks before. The subjective assertions that the police had "conditioned his mind" for the plea proceedings and that he lived in constant fear of the police totally lack the necessary specificity to free petitioner from the binding effect of his unequivocal representations to the court at the plea proceeding that he was acting voluntarily.

3. Even if petitioner is not bound by his representations to Judge Kaess at the guilty plea hearing, several factors appearing in the motion and transcripts of the plea and sentencing proceedings "conclusively show," in the aggregate, that he is entitled to no relief. First, the district court was entitled to reject petitioner's claim that he was innocent—a claim that was central to the allegation that he was coerced into pleading guilty to a crime he did not commit. Second, the medical report offered by petitioner relating to his period of hospitalization beginning on the day of his arrest does not support his allegation that the police treated him brutally on that day and caused an old gunshot wound to tear open and bleed freely. Third, the hospital records show that petitioner's claims that he was suffering from "severe illnesses" at the time of his arrest and during his initial period of hospitalization were significantly exaggerated. Fourth, the transcript of the plea proceeding belies petitioner's contention that he did not understand the terms used by the court in addressing him personally in compliance with Rule 11. Fifth, the court could properly take into ac-

count the unexplained delay of more than twenty months between the guilty plea hearing and petitioner's submission of the Section 2255 motion challenging the validity of his plea. Taken in the aggregate, these factors conclusively show that petitioner's claim of coercion was insubstantial and was properly denied without a hearing.

B

Petitioner also alleged in his motion to vacate that his guilty plea was the product of mental illness. This contention was also properly rejected without a hearing. The allegations in support of the mental illness claim were either conclusory or irrelevant, failing to specify instances of past aberrational conduct which would support the claim. Moreover, the hospital records tendered by petitioner rebutted any contention that a prior gunshot wound in the head or any of his other illnesses had rendered him mentally incompetent at the time he pleaded guilty.

C

Contrary to petitioner's contention, the record shows that he voluntarily and knowingly waived counsel at the guilty plea hearing. Furthermore, sound reasons of policy and practicality warrant rejection of petitioner's alternative argument that the Court, in deciding this case, should promulgate a rule—not required by the Constitution—forbidding the entry of guilty pleas in federal courts unless the defendant has a lawyer.

ARGUMENT

I

PETITIONER'S CLAIM THAT HIS GUILTY PLEA WAS COERCED WAS PROPERLY DENIED WITHOUT A HEARING

A. AS A GENERAL RULE, A DEFENDANT WHO PERSONALLY REPRESENTS TO THE COURT AT THE TIME HE PLEADS GUILTY THAT HE IS MAKING HIS PLEA VOLUNTARILY IS NOT LATER ENTITLED TO A HEARING ON HIS SELF-SERVING AND UNCORROBORATED ALLEGATION THAT HIS PLEA WAS, IN FACT, COERCED

1. Under 28 U.S.C. 2255, a federal prisoner may at any time file a motion in the court which imposed his sentence, seeking to vacate, set aside or correct the sentence on the grounds "that the sentence was imposed in violation of the Constitution or laws of the United States * * * or is otherwise subject to collateral attack." The statute directs the court to hold a hearing on such a motion "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief."[8]

The right to a hearing on allegations made in a Section 2255 motion attacking the validity of a guilty plea must be considered in the light of Rule 11 of the Federal Rules of Criminal Procedure. Under that rule, a district court may not accept a guilty plea "without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea." In addition, the court must be

[8] For a discussion of the legislative history of Section 2255, see *United States* v. *Hayman*, 342 U.S. 205, 210–219.

satisfied that there is a factual basis for the plea. The direct relationship between compliance with Rule 11 and resolution of a later collateral attack on the voluntariness of a guilty plea has been recognized by this Court. In *McCarthy* v. *United States*, 394 U.S. 459, 465, the Court noted that Rule 11

> * * * is intended to produce a complete record at the time the plea is entered of the factors relevant to [the] voluntariness determination. Thus, the more meticulously the Rule is adhered to, the more it tends to discourage, or at least to enable more expeditious dispositions of, the numerous and often frivolous post-conviction attacks on the constitutional validity of guilty pleas.

Of particular relevance here, the Court went on to state (394 U.S. at 469–470):

> Rule 11 is designed to eliminate any need to resort to a later fact-finding proceeding "in this highly subjective area." *Heiden* v. *United States*, [353 F. 2d 53, 55 (C.A. 9)]. The Rule "contemplates that disputes as to the understanding of the defendant and the voluntariness of his action are to be eliminated at the outset * * *." *Ibid.*

While we do not contend that compliance with Rule 11 automatically eliminates the need for later fact-finding proceedings in every instance, we do submit that as a general rule a defendant's explicit representation in open court that his guilty plea is not coerced by any threats or promises and is freely and voluntarily entered "conclusively shows," within the meaning of Section 2255, that the plea was

voluntary despite later uncorroborated allegations in a Section 2255 motion that the plea was not in fact voluntary.[9] The basic rationale for this position is that, except under unusual circumstances, a defendant should not be permitted by unsupported allegations to contradict the representations he personally made in open court at the time he entered his plea. See *United States* v. *Davis*, 319 F. 2d 482, 484 (C.A. 6); cf. *Lynott* v. *United States*, 360 F.2d 586, 588 (C.A. 3), certiorari denied, 386 U.S. 917.

There are, of course, circumstances under which a defendant's representations at a guilty plea hearing should not foreclose him from later attacking the voluntariness of his plea in a motion under Section 2255. The appropriate inquiry, in our view, should be whether it appears from allegations of objective facts in the Section 2255 motion or from the records in the case that the defendant could reasonably have been expected to disclose the alleged promises, threats or other impediments in response to the

[9] Most of the courts of appeals have followed this general rule. See, *e.g.*, *Pursley* v. *United States*, 391 F.2d 224 (C.A. 5); *Lynott* v. *United States*, 360 F.2d 586 (C.A. 3), certiorari denied, 386 U.S. 917; *Parker* v. *United States*, 358 F.2d 50 (C.A. 7), certiorari denied, 386 U.S. 916; *Putnam* v. *United States*, 337 F.2d 313 (C.A. 10); *United States* v. *Lester*, 328 F.2d 971 (C.A. 2); *United States* v. *Davis*, 319 F.2d 482 (C.A. 6); *Swepston* v. *United States*, 289 F.2d 166 (C.A. 8), certiorari denied, 369 U.S. 812. Other courts have required a hearing on a defendant's allegations made in a motion under Section 2255 contradicting his prior representations at arraignment. See, *e.g.*, *Walters* v. *Harris*, 460 F.2d 988, 991–993 (C.A. 4); *United States* v. *Simpson*, 436 F.2d 162 (C.A.D.C.); *United States* v. *McCarthy*, 433 F.2d 591 (C.A. 1); *Diamond* v. *United States*, 432 F.2d 35 (C.A. 9).

judge's personal inquiries under Rule 11 at the guilty plea hearing. If he could not reasonably have been expected to disclose these factors, then he should not be foreclosed from asserting them in a later collateral attack on his conviction.

The most obvious situation in which a defendant's responses at a guilty plea hearing would not "conclusively" dispose of later collateral attacks on the voluntariness of the plea would be where it later appears that the defendant may have been mentally incompetent at the time of the guilty plea hearing.[10] If he were in fact incompetent, he was legally incapable of admitting his guilt at the hearing.

Another example of a situation where a defendant would not be foreclosed from collaterally attacking his own prior representations at a guilty plea hearing might be where it is alleged in a Section 2255 motion that the guilty plea was induced by a promise of leniency made by the prosecutor who expressly or impliedly instructed the defendant not to disclose the promise to the court.[11] In such a situation, as the First Circuit observed in *United States* v. *McCarthy*, 433

[10] We show at pages 31–35, *infra*, that petitioner's allegations in his Section 2255 motion that he was mentally incompetent at the time of his plea do not require a hearing and that there is no reason to suspect he was actually incompetent at the time of his plea.

[11] See *Walters* v. *Harris*, 460 F.2d 988, 991–993 (C.A. 4); *United States* v. *McCarthy*, 433 F.2d 591 (C.A. 1); *United States* v. *Pallotta*, 433 F.2d 594 (C.A. 1); *United States* v. *Tweedy*, 419 F.2d 192, 193 (C.A. 9); see also *Reed* v. *United States*, 441 F.2d 569 (C.A. 9) (alleged promise by defense counsel); *Lopez* v. *United States*, 439 F.2d 997 (C.A. 9) (same). Cf. *Santobello* v. *New York*, 404 U.S. 257.

F. 2d 591, 593, "most defendants would be expected to deny any impropriety during the Rule 11 hearing." Or, as the Ninth Circuit noted in *United States* v. *Tweedy,* 419 F. 2d 192, 193, "a defendant might solemnly affirm to the court that his plea had not been induced by promises of leniency because he thought that this was all part of the game, and that honest answers would destroy the deal." Similarly, if a threat or promise is alleged to have been made off the record by the court itself at a guilty plea hearing, a hearing on the allegations might be necessary. Cf. *United States* v. *Simpson,* 436 F. 2d 162 (C.A.D.C.) (promise); *United States* v. *Tateo,* 214 F. Supp. 560 (S.D. N.Y.) (threat); and see *United States ex rel. McGrath* v. *LaVallee,* 319 F. 2d 308 (C.A. 2) (threat by state trial judge). For here, too, the record of the guilty plea hearing, though "undeniably of highest significance in any testing of the merit of the allegations," is—according to the allegations—"itself the product of a distortion deliberately wrought" (*United States* v. *Simpson, supra,* 436 F. 2d at 165). The above examples illustrate the type of situations in which defendants' disclaimers might properly be viewed as "evidential on the issue of voluntariness,*** not conclusive." *United States ex rel. McGrath* v. *LaVallee, supra,* 319 F. 2d at 314.

Where extenuating circumstances of the type described are not apparent on the face of a Section 2255 motion or the records of the case, however, the interests of justice are not served by permitting a defendant to disavow through self-serving and uncorrobo-

rated allegations his personal representations to the court at the time of his plea. For in such situations, the personal judicial inquiries required by Rule 11 provide the defendant with an adequate opportunity to expose possible coercive tactics used against him; his failure to take advantage of that opportunity and his explicit disclaimer of the existence of any threats or promises should foreclose later collateral attacks on the voluntariness of his plea. In the terms of Section 2255, the motion and the arraignment record in such a situation "conclusively show that the prisoner is entitled to no relief" and thus no hearing on the allegations in the motion is required.

2. In arguing that the arraignment record in this case should not be given conclusive effect, petitioner relies on this Court's decision in *Haynes* v. *Washington,* 373 U.S. 503, denying conclusive effect to expressions of voluntariness in allegedly coerced confessions (Br. 27–28). As the Court pointed out in *Haynes,* "[c]ommon sense dictates the conclusion that if the authorities were successful in compelling the totally incriminating confession of guilt, the very issue for determination, they would have little, if any, trouble securing the self-contained concession of voluntariness" (373 U.S. at 513). But the suggested analogy between a "self-contained concession of voluntariness" in an out-of-court confession claimed to have been coerced and an accused's representation to the court that no threat induced his guilty plea is false. In the confession case, the concession of voluntariness is made at the instance of the very authorities whose

allegedly coercive tactics produced the challenged confession in which the representation of voluntariness is contained. In the arraignment situation, the acknowledgement is made to the district judge, the arbiter of the plea's acceptability, in response to inquiries expressly designed to discover whether any such overreaching occurred. The proceedings are conducted, moreover, in a locale—the courtroom—removed in time and space from any coercive influences that might have affected prior proceedings.[12] In short, in most situations it is reasonable to require the defendant to answer the court's Rule 11 inquiries truthfully and to be bound by his answers.

Nor, contrary to petitioner's further assertion (Br. 21–24), does our position here conflict with this Court's decision in *Machibroda* v. *United States*, 368 U.S. 487. In that case, the defendant alleged in a Section 2255 motion that he had pleaded guilty to two informations in reliance on a promise by the prosecutor, said to have been cleared with the court, that he would not be sentenced to more than twenty years' imprisonment; the defendant was also allegedly warned by the prosecutor not to disclose the promise to his lawyer (368 U.S. at 489). Following the defendant's guilty pleas,

[12] A question not presented by this case is whether the exception to the general rule, that representations of voluntariness at plea proceedings should be conclusive, would apply where the guilty plea hearing took place within two or three days of alleged police coercion and where the coercion allegedly included an express warning to the defendant not to disclose the threats to the court. See *Smith* v. *United States*, 223 F. 2d 750 (C.A. 5).

the court had imposed consecutive sentences totaling 40 years. This Court concluded that the files and records did not conclusively show that the allegations in the Section 2255 motion were unfounded and held that a hearing was required. *Machibroda* is not controlling here for two distinct reasons. First, the trial judge in *Machibroda* had accepted the guilty pleas without questioning the defendant whether the pleas had been induced by threats or promises—indeed, the record in that case shows that no meaningful inquiries had been made of the defendant at all.[13] In other words, as the Sixth Circuit observed in *United States* v. *Davis, supra,* in distinguishing *Machibroda,* the accused had "made no representations to the Court about the nature of his plea" which he "later repudiated" in a Section 2255 motion (319 F. 2d at 485). Second, and equally important, the promise claimed to have been made in *Machibroda* was the type of promise which the defendant might reasonably have been expected not to disclose at his guilty plea hearing.[14]

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[13] See pp. 39–41 of the transcript of the arraignment proceedings in *Machibroda*, set forth in *United States* v. *Davis*, *supra*, 319 F.2d at 485, n. 1. Although petitioner asserts that Machibroda had admitted at arraignment that his pleas were voluntary (Br. 21), the transcript shows only that Machibroda answered affirmatively to the court's inquiry whether it was his "desire" to plead guilty.

[14] Petitioner discusses at length (Br. 31–36) this Court's decisions in *Brady* v. *United States*, 397 U.S. 742, *McMann* v. *Richardson*, 397 U.S. 759, and *Parker* v. *North Carolina*, 397 U.S. 790, in connection with his assertion that a hearing on allegations in a Section 2255 motion is especially appropriate where the defendant was not represented by counsel at the guilty plea

B. PETITIONER IS BOUND BY HIS IN-COURT REPRESENTATION THAT HIS GUILTY PLEA WAS NOT COERCED

The substance of petitioner's allegations in his motion to vacate is that the police coerced him into signing false written confessions to several crimes through physical mistreatment at the police station following his arrest, and induced him during his ensuing six-day confinement at the Detroit General Hospital to plead guilty to federal armed bank robbery by threatening that, if he did not so plead, he would be prosecuted in a Michigan state court and sentenced to life imprisonment (A. 9–11).[15] Yet 18 days following petitioner's discharge from the hospital and over three weeks after the alleged coercion at the police station, petitioner represented in open court in response to straightforward questions by the district court in full compliance with Rule 11 that no promises of any kind had been made to him, that no one had threatened him and that he was knowingly, freely and voluntarily pleading

hearing. In those cases, however, the issue was whether guilty pleas could be collaterally attacked as involuntary on the ground that they were prompted by possibly mistaken tactical judgments of counsel (for example, the desire to avoid the impact of a penalty scheme later found to be unconstitutional or to avoid the effect of earlier allegedly coerced confessions which might have been inadmissible at trial). In each case, this Court held that counsel's misapprehension of the legality of the penalty scheme or the admissibility of the confessions did not render the pleas involuntary where the defendants were represented by generally competent counsel. The cases have little bearing on the instant question: whether a defendant may disavow an assertion of fact made at the time of his guilty plea.

[15] Petitioner's assertion in his motion that he was mentally incompetent at the time of his plea is analyzed at pp. 31–35, *infra*.

guilty (A. 4–5). Since neither petitioner's motion nor the records in this case allege or disclose objective facts explaining why he could not have been expected to disclose the threats or coercion at the plea hearing, we submit that he is not now entitled to a hearing on his uncorroborated allegations of coercion.

Petitioner does season his allegations concerning his arrest and interrogation in the police station and hospital with some specificity. But his attempt to explain why he failed to disclose these matters at the time of the plea consists of the subjective and conclusory assertions that the police had "conditioned his mind" for the plea proceedings and that he did not understand the consequences of his waivers of counsel and indictment and of his guilty plea.[16] The latter assertions are belied by the transcript of the guilty plea hearing, which discloses specific acknowledgements by petitioner that he fully understood the nature of the proceedings and the consequences of his waivers and guilty plea.

[16] Petitioner also alleged that his constant fear of the police led him to agree to plead guilty (A. 11). While it is possible, of course, that an accused's fear of the police could be sufficiently strong to cause him to lie in open court in anticipation of what the police might do to him after the arraignment if he disclosed their coercive measures, this speculation does not warrant a hearing here since (1) the separation of time between the alleged coercion and the arraignment greatly reduces the chances that he was still acting out of fear at the arraignment, (2) the alleged mistreatment at his arrest and station-house interrogation took place at the hands of the local police whereas he would know that after his plea of guilty to a federal crime he would in all likelihood be in federal custody, and (3) the allegations of fear are generalized and apparently *pro forma*.

The assertion that the police had "conditioned his mind" is purely subjective and fails to set forth objective facts explaining why he could not have been expected to tell the truth in open court almost three weeks after the alleged coercion. There are no allegations that the police continued to coerce him while he was awaiting arraignment and no allegations that the police expressly warned him not to disclose their assertedly coercive tactics to the court. Compare *Smith* v. *United States, supra* (discussed in note 12, *supra*). In short, under all the circumstances, petitioner's representations in tendering his guilty plea foreclose him from reopening the question of the voluntariness of the plea by uncorroborated allegations.

C. EVEN IF PETITIONER IS NOT BOUND BY HIS REPRESENTATIONS AT THE PLEA HEARING, HIS SECTION 2255 MOTION AND THE RECORDS IN THIS CASE CONCLUSIVELY SHOW THAT HE IS ENTITLED TO NO RELIEF

In the event the Court disagrees with our foregoing submission that petitioner is bound by his representations to Judge Kaess at the guilty plea hearing, an examination of his motion and attachments and the transcripts of the guilty plea hearing and his sentencing "conclusively show that [he] is entitled to no relief," within the meaning of 28 U.S.C. 2255, and thus was not entitled to a hearing. While we do not maintain that any individual factor discussed below is conclusive, we do submit that, considered in the aggregate, they fully justified the denial of a hearing by the same district judge who presided over petitioner's arraignment, plea, and sentencing. *Cf. United States* v. *Thomas*, 291 F.2d 478, 481 (C.A. 6).

1. The District Court could readily conclude from the records in the case that petitioner's claim that he was innocent was unfounded

One of the central allegations in petitioner's motion to vacate is that he did not in fact commit the offense for which he was charged, but was coerced into pleading guilty after the police told him that he and another man had robbed the bank (A. 11). While a coerced guilty plea is invalid whether or not the defendant is actually guilty, petitioner's allegations of innocence and coercion are so interrelated that a showing that he was in fact guilty would seriously impugn the substantiality of his coercion claim. The records in this case conclusively rebut petitioner's claim of innocence.

When he entered his guilty plea, petitioner specifically acknowledged the details of the bank robbery (A. 5–6). While he alleged in his motion that these details were provided by the police (A. 11), he does not explain his further statement to Judge Kaess at arraignment, in apparent explanation of his crime, that "I got strung up on drugs and I started to make some money" (A. 6). In addition to his admissions at arraignment, petitioner stated three months later at his sentencing—again suggesting mitigating circumstances—"I was under the influence of drugs *when this happened*" (A. 8; emphasis added). In other words, nearly four months after the allegedly coercive conduct of the police, petitioner made a plea for mercy which contained an open admission that he had

mmitted the crime with which he was charged. Con-
stently with his approach at the time he offered his
ilty plea, petitioner sought—not to exonerate him-
lf as the victim of a police plot—but to offer ex-
ses for the crime he admittedly committed. Under
ese circumstances, petitioner's claim of innocence in
s Section 2255 motion could properly be disregarded
Judge Kaess. There is "no reason to doubt that his
lemn admission of guilt [at the guilty plea hearing]
as truthful." *Brady* v. *United States*, 397 U.S. 742, 758.

The motion and records in the case contain substantial additional indications that petitioner's claim of coercion was insubstantial

The hospital records attached to petitioner's motion
fute many of his allegations of coercion; the ar-
ignment transcript refutes others. Taken together,
ese factors give substantial support to the district
urt's summary denial of petitioner's motion.

a. Petitioner alleged in his motion that the brutal
eatment allegedly given him by the police following
s arrest had torn open a gunshot wound he had sus-
ined earlier, causing it to bleed freely (A. 10). The
spital discharge summary for the period of hospital-
ation beginning on the day of his arrest, however,
akes no reference to any recent bleeding from the
nshot wound (A. 19–20). The summary does discuss
two-week old gunshot wound in detail, but discloses
mply that petitioner was admitted with a history of

pain and with "a very superficial swelling" in his abdominal wall (A. 19).[17]

b. An integral part of petitioner's claim of coercion is that he was suffering from a number of "severe illnesses" at the time the alleged threats were made (A. 11). In support of this claim, petitioner made the assertion in his motion that the hospital records show that he was admitted to the hospital on the date of his arrest suffering from "Heroin addiction, serum hepatitis, gunshot wound in right abdomen, hematoma of the right flank and a convulsive disorder" (A. 10). In fact, however, petitioner was in the hospital twice, and this compilation of ailments combined the afflictions listed in the discharge summaries relating to both of his confinements (A. 16, 19).

References to heroin addiction, serum hepatitis and a convulsive disorder are contained only in the discharge summary relating to the period of hopitalization from December 17, 1969, to January 7, 1970, beginning over a month after his plea. The vomiting and other serious discomforts leading to that period of hospitalization had begun only a week before his admission or at least three weeks after he had pleaded guilty. While this second discharge summary does indicate that petitioner had been a known heroin addict

[17] Petitioner also alleged in his motion that he regained consciousness from the last of several blackouts suffered during the alleged police brutality as he was being admitted to the hospital (A. 10). We point out that the hospital record contains no support whatever for any suggested implication that his hospitalization might have been necessitated by the alleged police misconduct.

for two years and had been suffering headaches and seizures for seven years (A. 16), it is, of course, the first period of hospitalization, beginning on the day of petitioner's arrest, which is of major relevance to his claim of coercion. The discharge summary for the first period of hospitalization does not refer to these conditions. The summary describes petitioner's condition as "absolutely normal," apart from the superficial swelling from the gunshot wound, and states that he had been discharged in "good condition" (A. 19–20).[18]

Thus the "severe illnesses" petitioner claimed to have been suffering from at the time of his arrest and during his initial hospitalization and which allegedly led him to succumb to the alleged threats were significantly exaggerated. This fact appeared from the face of the motion and the attached exhibits and could properly have been considered by the district court in appraising the credibility of the coercion claim itself.

c. Petitioner alleged in his motion that the legal terms used by the court at the guilty plea hearing were "complete jargon" to him, "beyond his sphere of comprehension" (A. 11–12). The record shows, however, that the court in the main used such simple terms as "bank," "robbery," "armed," "gun," "held up," "teller," "promise" and "threatened" and that petitioner's answers to the questions using these terms

[18] According to the report of the later hospitalization, apart from a urinary tract infection, all other tests, including a neurological examination, were negative.

were coherent and responsive (A. 4–6). Judge Kaess, who had been in a position to appraise petitioner's understanding of the proceedings, could properly have concluded that petitioner's claim of a lack of comprehension was specious and was conclusively refuted by the record.

d. Finally, the district court was entitled to reject outright petitioner's incredible statement that, despite his alleged innocence, the police had convinced him he was a "bona fide bank robber" (A. 11).

3. The unexplained delay of more than twenty months before instituting the challenge to the plea in itself casts further doubt on the substantiality of petitioner's coercion claim

The motion to vacate was sworn to on July 20, 1971—more than 20 months after the guilty plea was entered and over 17 months after sentence was imposed (A. 3, 8, 12). No explanation for the delay was offered in the motion, with the possible exception of the conclusory and subjective references to petitioner's alleged traumatic fear of the police (A. 11). This delay in instituting the challenge to the allegedly coerced plea in itself renders the allegations in the motion suspect. Cf. *Raines* v. *United States,* 423 F. 2d 526, 531 (C.A. 4); *United States* v. *Orlando,* 327 F. 2d 185, 188–189 (C.A. 6), certiorari denied, 379 U.S. 825. This Court's decision in *Machibroda* v. *United States, supra,* does not stand for the contrary proposition that unexplained delays in seeking collateral relief should be ignored. While the motion to vacate in that case was not filed until nearly three years after the

guilty plea, the defendant attempted to explain the delay by alleging that he had written unanswered letters to the court and the Attorney General in the interim referring to his claims (368 U.S. at 490). This Court implied that the delay might indeed be significant in appraising the credibility of the substantive allegations by suggesting that the district court on remand might inquire whether the sending of such letters could be substantiated (368 U.S. at 495).

In summary, the above factors taken in the aggregate conclusively show that petitioner's claim that his plea was coerced is insubstantial and was properly denied without a hearing. Just as this Court concluded in *Parker* v. *North Carolina,* 397 U.S. 790, 796, in rejecting the claim that a guilty plea was the product of "allegedly coercive interrogation" several weeks earlier, this record reveals that "the guilty plea was * * * [petitioner's] free and voluntary act, the product of his own choice, just as he affirmed it was when the plea was entered in open court."

II

PETITIONER'S CONCLUSORY ALLEGATIONS THAT HE WAS MENTALLY INCOMPETENT AT THE TIME OF HIS GUILTY PLEA DID NOT REQUIRE A HEARING

In addition to his primary claim that his guilty plea was coerced, petitioner alleged at the end of his Section 2255 motion, almost as an afterthought, that he was "mentally ill" at the time of his arraignment and that his guilty plea was "a product" of that illness (A. 12). Petitioner also alleged that he "has a

severe mental problem and that he suffers from epi
lepsy and a mental trauma of major proportions du
to his having been shot in the head by the polic
when he was a teenager" (A. 11), although the contex
of these allegations suggests they were intended t
support the principal claim of coercion. Even if con
strued as part of petitioner's assertion of mental in
competence at the guilty plea hearing, however, th
allegations are insufficient to entitle petitioner to
hearing on that assertion, since the references to
"severe mental problem" and major "mental trauma
are wholly conclusory and since proof that petitione
was an epileptic would not, without more, establish
claim of mental incompetence.

Where a motion under Section 2255 alleges onl
"bald legal conclusions," the motion may properly b
denied without a hearing. *Sanders* v. *United State*
373 U.S. 1, 19; *Hayes* v. *United States,* 399 F. 2d 69
(C.A. 5); *Oliver* v. *United States,* 398 F. 2d 353, 35
(C.A. 9); *Hartman* v. *United States,* 310 F. 2d 44
(C.A. 6). As the Fifth Circuit held in *Hayes,* a Sec
tion 2255 motion alleging mental incompetence at th
time of plea may be summarily denied in the absenc
of assertions of "specific facts regarding the claime
prior mental history, background, or incidents o
aberration to support the conclusory allegations * * *
(399 F. 2d at 691). Contrary to petitioner's assertio
(Br. 30, n. 16), the hospital records attached to hi
motion do not satisfy the requirement of specificity

The letter from the Florida hospital describes pe
titioner's 1962 head wound which allegedly had le

to the "mental trauma" referred to in the motion. The letter indicates that the bullet causing the wound had entered the head at the floor of petitioner's mouth, had fractured his skull and several bones and had lodged in his frontal sinus. The letter does not refer to brain damage, however, and notes that petitioner had been "discharged as improved, with a prognosis of good" after only two weeks of hospital care (A. 21). The second of the two Detroit hospital discharge summaries refers to petitioner's 1962 wound and reports that he claimed to have had "persistent headache and episodes of seizures" since the incident, but does not mention any mental impairment other than the seizures (A. 16). On the contrary, that report—which petitioner annexed to his motion—stated that he had been subjected to neurological examination and that the examination "showed no neurological deficit" (A. 17).

Petitioner also states in his brief that the second discharge summary "confirms that [he] had been in jail continuously after his arrest and had been experiencing heroin withdrawal symptoms" (Br. 30). While the discharge summary does not identify petitioner's symptoms as stemming from heroin withdrawal,[19] it lists heroin addiction as one of his ailments and notes that he had not received any heroin since his arrest (A. 16). Thus, the record does indicate that petitioner might have been addicted when he pleaded guilty on

[19] The summary notes that the vomiting, dark urine, fever and other discomforts had begun about one week before petitioner's admission to the hospital on December 17, 1969. Petitioner was treated for a urinary tract infection.

November 13, 1969, even though it appears he had then been off heroin since his arrest 23 days before.[20] Petitioner does not appear to argue that his possible addiction at the time of his guilty plea in itself rendered him mentally incompetent. Nevertheless, because there has been some confusion in earlier proceedings on the relevance of his addiction,[21] we point out that a history of drug addiction, without more, does not make one incompetent to plead guilty. *Howard* v. *United States,* 420 F. 2d 478 (C.A. 5); *Lipscomb* v. *United States,* 209 F. 2d 831 (C.A. 8), certiorari denied, 347 U.S. 962; cf. *Sanders* v. *United States, supra,* 373 U.S. at 19–20. Of course, as this Court held

[20] At petitioner's sentencing on February 13, 1970, petitioner stated that he thought he had kicked the habit "already" (A. 8). He did not indicate when he had kicked the habit.

[21] Petitioner argued before the district court in response to the government's motion to dismiss his Section 2255 motion that his statement during the guilty plea hearing that "I got strung up on drugs * * *" should have warned the court that petitioner's "mental capabilities might well have been impaired causing him to incompetently waive basic rights and plead guilty * * *" (A. 27). Presumably as a result of this argument, the district court stated in its opinion denying the 2255 motion that petititoner had alleged, among other things, that his plea was the product of drug addiction (A. 30). In his petition for a writ of certiorari, petitioner again referred to his alleged drug addiction and to his statement at arraignment (Pet. 11). In our Memorandum in Opposition, we referred to petitioner's Section 2255 motion as having alleged that the plea was invalid because of (among other things) "addiction to heroin" (p. 1). In his Reply, however, petitioner disclaimed reliance on drug addiction as a factor invalidating his plea, pointing out that the Section 2255 motion had made no claim that addiction was responsible for the plea, and suggesting that the district court and we had confused the issues (pp. 2, 4). The disclaimer has not been repudiated.

in *Sanders,* a plea made by a defendant under the influence of drugs may be invalid; but petitioner has at no time suggested that he was under the influence of drugs when he entered his plea, as the prisoner in *Sanders* alleged. On the contrary, in the present case, the record affirmatively shows that petitioner had had no access to narcotics for at least several weeks prior to the entry of his plea.

Finally, petitioner's allegation that he suffered from epilepsy required no hearing because the allegation was irrelevant. "Epilepsy is not insanity and is distinguished therefrom medically and legally." *Ellis* v. *United States,* 274 F. 2d 52 (C.A. 10). Cf. *Gann* v. *Gough,* 79 F. Supp 912, 914 (N.D. Ga.), reversed on other grounds *sub nom. Hiatt* v. *Gann,* 170 F. 2d 473 (C.A. 5), certiorari denied, 337 U.S. 920. Petitioner made no allegation that his guilty plea was affected by an actual seizure during the guilty plea hearing. And, as we have discussed above, a hospital neurological examination proved negative.

III

PETITIONER VALIDLY WAIVED HIS RIGHT TO COUNSEL

Petitioner contends in his brief on the merits that the record fails to reflect that he effectively waived his right to counsel, [22] and in the alternative that, in any event, this Court should exercise its supervisory power

[22] In his Section 2255 motion, petitioner alleged he had not understood the "consequences" of his waiver of counsel (A. 11) and that the waiver "was a product of his mental illness" (A. 12). These allegations were repeated in his *pro se* petition for a writ of certiorari (Pet. 6).

over proceedings in federal courts to forbid uncounseled guilty pleas altogether or at least require a defendant to consult with an attorney before waiving counsel (Br. 47–59). In our view, these contentions should be rejected.

1. The Court has made it clear that a guilty plea to a felony charge entered without counsel is invalid, unless counsel has been waived. See *White* v. *Maryland,* 373 U.S. 59; *Arsenault* v. *Massachusetts,* 393 U.S. 5; *Brady* v. *United States, supra,* 397 U.S. at 748–749, n. 6. Under the Court's definition, waiver is an "intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst,* 304 U.S. 458, 464. Whether there has been "an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Ibid.* To make an "intelligent waiver," however, a defendant need not act with any particular degree of wisdom; all that is required is that he "knows what he is doing and [that] his choice is made with eyes open." *Adams* v. *United States ex rel. McCann,* 317 U.S. 269, 279. Or, as the Court held in *Carnley* v. *Cochran,* 369 U.S. 506, 516, the record must show that the accused "was offered counsel" and "understandingly rejected the offer." Petitioner's waiver was valid under these standards.

At the time of the guilty plea hearing, petitioner was a 26-year-old man with a seventh grade education. By his own admission, he had several prior convictions (A. 11, 16; Pet. 11; Reply to Memorandum in

position, p. 4). He was informed by the district dge that he was "entitled to be represented by an torney" and that if he was "without funds with hich to employ an attorney" the court would "ap- int one" for him. The judge noted that he had fore him a "waiver of assignment of an attorney," eviously executed by petitioner, and inquired ether petitioner wished "to proceed here without attorney." When petitioner replied "I guess so," court advised him that guessing would not be ficient; he had to "know" whether he wanted to oceed without a lawyer. Petitioner then responded, es, sir" (A. 4). Petitioner suggests that his response es, sir" was ambiguous and could have been in- ded merely as an acknowledgement that he could "guess" about the waiver, rather than as an ex- cit waiver of counsel (Br. 53). In retrospect, on a d record and in isolation, petitioner's answer could argued to appear ambiguous. But the intonation at hearing evidently signaled no ambiguity or un- tainty to the district judge. And the full context of exchange demonstrates that petitioner was making leliberate waiver. Prior to the hearing, petitioner l signed a written waiver of counsel; at the hearing, was unequivocally informed of his right to counsel the district court, and he raised no objection when district court left the waiver issue to inquire ether petitioner was aware of the penalties that ld be imposed. Under these circumstances, it is ar that petitioner's response was intended as, and accepted by the district court as, a knowing waiver

of counsel." Furthermore, three months later, whe
petitioner appeared before the same district judge fo
sentencing, the judge noted that at the time of h
plea he had waived the appointment of counsel an
asked him whether it was "your wish that you proce
here through sentence without being represented b
counsel." Petitioner again responded unambiguously
"Yes, sir" (A. 8). Thus, the record in this case con
clusively shows that petitioner's guilty plea is no
subject to collateral attack on the ground of a def
ciency in waiving counsel. That waiver satisfied all o
the constitutional tests.

2. Petitioner also suggests (Br. 56) that, irrespe
tive of whether the waiver of counsel in this case wa
constitutionally valid, this Court should assert its su
pervisory powers to prohibit uncounseled guilty plea
in federal courts. This argument raises a serious con
stitutional question whether a defendant can be force
to be represented by counsel. Over 30 years ago, th
Court rejected the proposition, holding: "The right t
assistance of counsel and the correlative right to dis
pense with a lawyer's help are not legal formalisms
• • • [T]he Constitution does not force a lawyer upo
a defendant." *Adams* v. *United States ex rel. McCann*
supra, 317 U.S. at 279."

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[23] Petitioner also argues that the court erred in failing t
inform him expressly at the guilty plea hearing that he coul
repudiate his prior written waiver of counsel (Br. 52–53). How
ever, the court's inquiry "Is it your wish to proceed here with
out an attorney?" (A. 4) adequately notified petitioner tha
he was being asked then and there whether he wanted an at
torney notwithstanding the prior waiver.

[24] See also *United States* v. *Dougherty* (D.C. Cir. No. 24,31
decided June 30, 1972, rehearing denied October 26, 1972), re

Forcing a lawyer on a defendant would certainly not lay the foundation for the kind of professional relationship that should exist between a client and his lawyer. In addition, a policy that refused to permit a defendant to terminate the proceedings against him without the intervention of a lawyer would create new problems; for example, it is easy to anticipate claims by defendants convicted after a trial under such circumstances that he would have received better treatment if he had been allowed to plead guilty instead of acquiescing in the "advice" by his court-imposed counsel that he go to trial.

The alternative suggestion that a defendant be required to *confer* with a lawyer at least once before finally waiving counsel is worthy of consideration and, as petitioner points out (Br. 57), has been recommended by the American Bar Association. See *Standards Relating to Providing Defense Services*, pp. 64–65 (approved draft, 1968). The imposition of such a requirement, however, would have a substantial impact upon the administration of justice in the federal courts.[25] Whether the requirement should be adopted in the federal system requires a careful balancing of this impact against the likely utility of the rule. In our view, these considerations are essentially legisla-

versing a criminal conviction in which the trial court had insisted that the defendants be represented by counsel, and holding that a criminal defendant has a statutory right under 28 U.S.C. 1654 to waive counsel and proceed *pro se*.

[25] Petitioner cites statistics furnished by the Administrative Office of the United States Courts indicating that for the fiscal years 1969 through 1972, a total of 19,393 defendants pleaded guilty after waiving counsel. There were 104,544 guilty pleas entered during this period (Br. 56, n. 40).

tive in nature and the proposed rule should be adopted, if at all, either by statute or by an amendment to the Federal Rules of Criminal Procedure, after thorough discussion. Imposition of such a requirement—not required by the Constitution—as part of the disposition of a particular case would be inappropriate.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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(Slip Opinion)

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SUPREME COURT OF THE UNITED STATES

No. 71-6757

David X. Fontaine, Petitioner, *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[April 2, 1973]

PER CURIAM.

On November 13, 1969, the petitioner was arraigned in a federal district court upon a charge of robbery of a federally insured bank.[1] He executed a written waiver of his right to counsel and to a grand jury indictment, and pleaded guilty. Before accepting the plea, the trial judge, proceeding under Rule 11 of the Federal Rules of Criminal Procedure, addressed the petitioner personally. The petitioner acknowledged in substance that his plea was given voluntarily and knowingly, that he understood the nature of the charge and the consequences of the plea, and that he was in fact guilty. See *McCarthy* v. *United States*, 394 U. S. 459, 464–467; cf. *Boykin* v. *Alabama*, 395 U. S. 238, 242. The judge then accepted the guilty plea and subsequently sentenced the petitioner to 20 years in prison.

On July 20, 1971, the petitioner filed a motion under 28 U. S. C. § 2255 to vacate his sentence on the grounds that his plea of guilty had been induced by a combination of fear, coercive police tactics, and illness, including mental illness. The District Judge who had accepted

[1] He had been arrested by state officers and had been in the custody of state police and state jurisdiction until the time of the federal charge.

the petitioner's plea and sentenced him to prison considered the motion but denied it without an evidentiary hearing; the District Judge reasoned that since the requirements of Rule 11 had been met, this collateral attack was *per se* unavailable, stating: "When the trial court has so questioned the accused about pleading guilty, the petitioner cannot now be heard to collaterally attack the record and deny what was said in open court." The Court of Appeals for the Sixth Circuit affirmed on the same grounds.

Petitioner seeks certiorari to review that judgment; he urges that under the plain wording of § 2255 and our decision in *Machibroda* v. *United States*, 368 U. S. 487, he was entitled to an evidentiary hearing on his claims. Petitioner's motion for relief under § 2255 sets out detailed factual allegations regarding alleged circumstances occurring after his arrest and before his appearance in court. Those allegations describe physical abuse and illness from a recent gunshot wound that required hospitalization which was documented by records tendered in support of his petition. The records also showed that a month following the plea he was again hospitalized for heroin addiction, for aggravation of the earlier gunshot wound and other severe illnesses. Petitioner further alleges that prolonged interrogation continued during the period preceding his plea. All of this, he claims, coerced his confession, his waiver of counsel and the uncounselled plea of guilty. It is elementary that a coreced plea is open to collateral attack. *Machibroda* v. *United States*, 368 U. S. 487, 493. See also *Waley* v. *Johnston*, 316 U. S. 101; *Walker* v. *Johnston*, 312 U. S. 275; *Diamond* v. *United States*, 432 F. 2d 35, 39; *Crow* v. *United States*, 397 F. 2d 284, 285–286. It is equally clear that § 2255 calls for a hearing on such allegations unless "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief. . . ."

We need not take issue with the Government's generalization that when a defendant expressly represents in open court, without counsel, that his plea is voluntary and that he waived counsel voluntarily, he "may not ordinarily" repudiate his statements to the sentencing judge. The objective of Rule 11 Federal Rules of Criminal Procedure, of course, is to flush out and resolve all such issues, but like any procedural mechanism, its exercise is neither always perfect nor uniformly invulnerable to subsequent challenge calling for an opportunity to prove the allegations.[2]

On this record, we cannot conclude with the assurance required by the statutory standard "conclusively show" that under no circumstances could the petitioner establish facts warranting relief under § 2255; accordingly, we vacate the judgment of the Court of Appeals and remand to that court to the end that the petitioner be afforded a hearing on his petition in the District Court.

MR. JUSTICE WHITE dissents.

[2] The petitioner has also urged in this Court that his plea must be vacated because the transcript of his pleading fails to disclose an intelligent waiver of counsel. But this claim was not raised in the Court of Appeals or in the petition for certiorari, and we accordingly express no view upon the question.